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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

Nos. 807–813.

HE MERCHANTS' COTTON PRESS AND STORAGE CO. AND OTHERS, PLAINTIFFS IN ERROR,

vs.

HE INSURANCE CO. OF NORTH AMERICA OF PHILADELPHIA ET AL.

FILED SEPTEMBER 15, 1892.

(15,133, &c.)

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No. 807.

THE MERCHANTS' COTTON PRESS AND STORAGE CO., PLAINTIFF IN ERROR,

vs.

THE INSURANCE CO. OF NORTH AMERICA OF PHILADELPHIA ET AL.

No. 808.

THE NATIONAL FIRE INSURANCE CO. OF CONN., PLAINTIFF IN ERROR,

vs.

THE INSURANCE CO. OF NORTH AMERICA OF PHILADELPHIA ET AL.

No. 809.

THE MUTUAL FIRE INSURANCE COMPANY OF N. Y., PLAINTIFF IN ERROR,

vs.

THE INSURANCE CO. OF NORTH AMERICA OF PHILADELPHIA ET AL.

No. 810.

THE CONTINENTAL INSURANCE CO. OF N. Y., PLAINTIFF IN ERROR,

vs.

THE INSURANCE CO. OF NORTH AMERICA OF PHILADELPHIA ET AL.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 9, 1893.

No. 811.

THE FIRE ASSOCIATION OF NEW YORK, PLAINTIFF IN ERROR,

vs.

THE INSURANCE CO. OF NORTH AMERICA OF PHILADELPHIA ET AL.

No. 812.

THE LIVERPOOL & LONDON & GLOBE INS. CO. OF ENGLAND, PLAINTIFF IN ERROR,

vs.

THE INSURANCE CO. OF NORTH AMERICA OF PHILADELPHIA ET AL.

No. 813.

THE ROYAL INS. CO. OF ENGLAND, PLAINTIFF IN ERROR,

vs.

THE INSURANCE CO. OF NORTH AMERICA OF PHILADELPHIA ET AL.

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a–4 The Chancery Court of Shelby County, State of Tennessee.

STATE OF TENNESSEE, }
Shelby County. }

Be it remember that at a term of the chancery court of Shelby county, State aforesaid, began and held at the court-house, in the city of Memphis, in and for said county, on Monday, the 5th day of October, 1891, the same being the first Monday in October, 1891—present and presiding, the Hon. Leopold Lehman, special chancellor-elect, sitting by interchange with the Hon. W. D. Beard, chancellor, who was incompetent—the following proceedings were had, to wit:

Copy of Original Bill Filed Aug. 7th, 1891, in the Chancery Court of Shelby County, Tennessee.

To the Hon. Bedford M. Estes, chancellor of the chancery court of Shelby county, Tennessee:

5 THE INSURANCE COMPANY OF NORTH AMERICA OF PHILADELPHIA, a Corporation by the Laws of the State of Pennsylvania; The Atlantic Mutual Insurance Company, a Corporation by the Laws of the State of New York; The Providence Washington Insurance Company, a Corporation by the Laws of the State of Rhode Island, on Their Own Behalf and on Behalf of All Other Marine Insurers Who May Be Entitled to Share with Them in the Funds Hereinafter Mentioned, Bring This Their Bill of Complaint

Against

THE DELAWARE MUTUAL SAFETY INSURANCE COMPANY, a Corporation by the Laws of Pennsylvania; The Marine Insurance Company, Limited, of London, Resident of the United Kingdom of Great Britain and Ireland; The Phenix Insurance Company, a Corporation by the Laws of the State of New York; R. H.
6 Denning and James H. Foster, Partners as R. H. Denning & Co., Residents of Rhode Island; The British and Foreign Marine Insurance Company, Limited, of Liverpool, England, Resident of the United Kingdom of Great Britain and Ireland; The Union Marine Insurance Company, Limited, of said Kingdom; The Merchants' Cotton Press and Storage Company, a Corporation by the Laws of the State of Tennessee; Lloyd's Companies, an Association of Insurers Resident and Subjects of the United Kingdom of Great Britain and Ireland; The C., V. & C. Line, a Corporation Non-resident of the State of Tennessee and Created under the Laws of the State of Illinois; Anthony J. Thomas and Charles E. Tracy, as Receivers thereof, Both Citizens of the State of New York; S. R. Montgomery, Napoleon Hill, and T. H. Allen, as Trustees Only, Citizens of the State of Tennessee and Residents of Shelby County; The Royal Insur-
7 ance Company, Resident of the United Kingdom of Great Britain and Ireland; The Ætna Fire and Marine Insur-

ance Company, a Corporation by the Laws of West Virginia; The Capital City Fire Insurance Company, a Corporation by the Laws of the State of Alabama; The Central Manufacturers' Insurance Company, a Corporation by the Laws of the State of Ohio; The Citizens' Mutual Insurance Company, a Corporation by the Laws of the State of Iowa; The Commercial Fire Insurance Company, a Corporation by the Laws of the State of Alabama; The Commonwealth Mutual Insurance Company, a Corporation by the Laws of the State of Illinois; The Continental Insurance Company, a Corporation by the Laws of the State of New York; The Council Bluffs Insurance Company, a Corporation by the Laws of the State of Iowa; The Est. Texas Fire Insurance Company, a Corporation by the Laws of the State of Texas; The Fire Association, a
8 Corporation by the Laws of the State of New York; The German-American Insurance Company, a Corporation by the Laws of the State of Pennsylvania; The Germania Insurance Company, a Corporation by the Laws of the State of Louisiana; The German Fire Insurance Company, a Corporation by the Laws of the State of West Virginia; The Home Insurance Company, a Corporation by the Laws of the State of Louisiana; The Hope Insurance Company, a Corporation by the Laws of the State of Louisiana; The Indiana Insurance Company, a Corporation by the Laws of the State of Indiana; The Liverpool, London & Globe Insurance Company, a Resident of the United Kingdom of Great Britain and Ireland; The Lumbermen's and Manufacturers' Insurance Company, a Corporation by the Laws of the State of Wisconsin; The Mutual Fire Insurance Company, a Corporation by the Laws of the State of New York; The Milwaukee
8½ Mutual Fire Insurance Company, a Corporation by the Laws of the State of Wisconsin; The Manufacturers' Mutual Fire Insurance Company, a Corporation by the Laws of the State of Wisconsin; The Mutual Fire Association, a Corporation by the Laws of the State of Wisconsin; The Millers' Mutual Insurance Company, a Corporation by the Laws of the State of Wisconsin; The Manufacturers' Fire Insurance Company, a Corporation by the Laws of the State of West Virginia; The Millers' National Insurance Company, a Corporation by the Laws of the State of Illinois; The Mutual Fire Insurance Company, a Corporation by the Laws of the State of Illinois; The Mississippi Valley Manufacturers' Mutual Insurance Company, a Corporation by the Laws of the State of Iowa; The Manufacturers' and Merchants' Mutual Insurance Company, a Corporation by the Laws of the State of Illinois; The Mutual Union Insurance Company, a Corporation by the
9 Laws of the State of Illinois; The Mississippi Home Insurance Company, a Corporation by the Laws of the State of Mississippi; The Minneapolis Mutual Fire Insurance Company, a Corporation by the Laws of the State of Minnesota; The National Fire Insurance Company, a Corporation by the Laws of the State of Connecticut; The New Orleans Insurance Company, a Corporation by the Laws of the State of Louisiana; The Oshkosh

Mutual Fire Insurance Company, a Corporation by the Laws of the State of Wisconsin; The Ohio Valley Insurance Company, a Corporation by the Laws of the State of West Virginia; Phœnix The People's Insurance Company, a Corporation by the Laws of the State of Louisiana; The People's Fire Insurance Company, a Corporation by the Laws of the State of Connecticut; The Reliance Mutual Insurance Company, a Corporation by the Laws of the State of Iowa; The Security Fire Insurance Company, a Corporation by the Laws of the State of Iowa; The Standard
9½ Fire Insurance Company, a Corporation by the Laws of the State of West Virginia; Wisconsin Mutual Fire Insurance Company, a Corporation by the Laws of the State of Wisconsin; The Western Manufacturers' Mutual Fire Insurance Company, a Corporation by the Laws of the State of Illinois; The Western Fire & Marine Insurance Company, a Corporation by the Laws of the State of Dakota; The Rhenish Westphalin Insurance Company, Lloyd's, a Resident of the United Kingdom of Great Britain and Ireland; The Underwriters at Lloyd's, Resident of the United Kingdom of Great Britain and Ireland; The Maritime Insurance Company, Resident of the United Kingdom of Great Britain and Ireland; The Union Fire and Marine Company at New Zealand, Resident of the United Kingdom of Great Britain and Ireland; The Ulster Marine Insurance Company, Resident of the United Kingdom of
10 Great Britain and Ireland; The Standard Insurance Company, Limited, Resident of the United Kingdom of Great Britain and Ireland, and William Watson and E. R. Wood, Partners at Memphis, Tenn., as Watson, Wood & Co.

And thereupon your orators say that on the 17th of November, 1887, in one of the presses of the Merchants' Cotton Press & Storage Company, there were destroyed by fire about fourteen thousand bales of cotton, of the value of about seven hundred thousand dollars, some of which was insured against a loss by fire under the policies of marine insurance hereinafter to be referred to.

Of the said lots of cotton thus destroyed by fire five thousand and twenty-eight bales were covered under the bills of lading granted by the C., V. & C. line, a copy of one which is hereinafter set forth, marked Exhibit "A."

11 For the loss of all the aforesaid cotton destroyed by fire the C., V. & C. line — liable to the owners respectively for their several lots of cotton and to the marine insurers of such owners, the said destruction by fire not being excepted by the conditions of limitation of liability contained in the bills of lading of the C., V. & C. line granted by the shippers or any one of them.

Among the several lots of cotton under the bills of lading of the C., V. & C. line was a lot of fifty bales to Hooper & Buffinton and a lot of one hundred bales to E. H. Coates & Co. The supreme court of Tennessee rendered in favor of the said Hooper & Buffinton and E. H. Coates & Co. judgments against the Merchants' Cotton Press & Storage Company and their insurers for the value of the said two

lots of cotton, and in the decree pronounced in the suit of Deming & Co. against The Merchants' Cotton Press & Storage Company *et al.*, hereinafter to be alluded to, the value of these two lots was excluded from the cotton covered under the bills of lading of the said C., V. & C. line in reserving the rights of the parties to the trust fund, which it was made the duty of the Merchants' Cotton Press and Storage Company to collect and hold by the terms of said decree.

To protect itself against any loss by reason of granting bills of lading upon cotton delivered to the press No. 4, the C., V. & C. line, by its receivers, and the Merchants' Cotton Press & Storage Company entered into a contract in the words and figures following:

This agreement is made and entered into on this 24th day of May A. D. 1887, between the Cairo and Vincennes Railroad Company of Cairo, Ill., and by its receivers Anthony J. Thomas and Charles E. Tracy, hereinafter termed the party of the first part, and the Merchants Cotton Press & Storage Company of Memphis, Tenn., by its general manager, H. A. Montgomery, hereinafter termed the party of the second part, and witnesseth as follows:

First. The party of the first part hereby agrees to give to the party of the second part all cotton to compress that they carry out of Memphis compressed. The party of the second part bind themselves to properly and promptly compress all of said cotton and shall insure the same for the benefit of the first party, and the price to be paid therefor by the said first party shall be at the rate of twelve and one-half cents per one hundred pounds, bill-of-lading weights, for all cotton so compressed, etc., on and prior to the thirty-first day of August, 1887, and ten cents per one hundred pounds, bill-of-lading weights, for all cotton so compressed, etc., thereafter during the term of this agreement. This compensation covers compressing and insurance — we will as the use of the second party's grounds, sheds, platforms, steamboat landing, and all services rendered by said second party in and about such cotton delivered it hereunder until the same is delivered, either in cars or to steamboats, to the first party by the second party.

Second. Such insurance shall be taken for the benefit of the first party, in good and solvent companies, so as to cover any loss while such cotton is under the second party's control, and until delivered to the first party.

Third. The second party shall be liable for any loss arising from negligence or lack of care in anywise to such cotton while under its control, agreeing to be bound therefor as a bailee for hire, and for any such loss shall pay the first party all damages and cost, or the first part may retain any dues to the second party to cover such loss. This, however, not to be limited to the amount of such dues.

Fourth. The first party hereby constitutes the second party its agent, to receive such cotton for it, and sign receipts on which bills

of lading may be issued, when cotton is delivered to their compresses on the ground located at its river landing.

Fifth. So far as it can legally *to* do, the first party agrees to establish no other compress agency, nor employ any other compress to do its compressing of cotton at Memphis, Tenn., during the term of this contract.

Sixth. All bills for compressing cotton shall be paid weekly.

Seventh. This contract is to continue in force until the thirty-first day of August, 1896, said rate of twelve and one-half cents per hundred pounds being for one year from the first day of Sep-
16 tember, 1886, and the said rate of ten cents per one hundred pounds for the remaining nine years; and this contract is to relate back to the said first day of September, 1886, and is to cover as to its terms all compressing of cotton by the second party for the first party since that date.

In witness whereof we have this day set our hands and seals.

ANTHONY J. THOMAS,
CHARLES E. TRACY, *Receivers.*
MERCHANTS' COTTON PRESS & STORAGE COMPANY,
By H. A. MONTGOMERY, *G. M.*

Thereafter and in performance of the obligation imposed upon it by the aforesaid contract the Merchants' Cotton Press & Storage Company procured in several different companies and in several amounts insurance covering all cotton in bales received by them as agents for the benefit of railroads, transportation companies, or
17 owners to attach on receipt of the said cotton on the said premises, and to cease when removed from the same.

The purpose of the C., V. & C. line and its receivers and of the Merchants' Cotton Press & Storage Company was by the said insurance to indemnify the C., V. & C. line from any loss by reason of its aforesaid bills of lading while the cotton was yet in the press of the Merchants' Cotton Press & Storage Company, and the object of the C., V. & C. line and its receivers in requiring the Merchants' Cotton Press & Storage Company to enter into the contract of the 24th of May, 1887, was to impose upon the said Compress Company the obligation to effect insurance in good and solvent companies, so as to cover any loss while the cotton was yet in the press of that company, and by the said insurance provide an indemnity which should be primary to the liability of the C., V. & C. line.

18 The policies effected and in force when the fire occurred were in the several different companies and in several amounts following the name of the respective companies, the number of the policy, residence of the company, and amount of insurance being as follows:

No. policy.	Name of company.	Residence.	Amount.
18151	Ætna F. & M. Ins. Co	Wheeling, W. Va	$1,000.00
11112	Capital City Ins. Co	Montgomery, Ala	2,500.00
1777	Central Mfgs.' Ins. Co	Van Wert, Ohio	3,500.00
398	Citz. Mut. Ins. Co	Waterloo, Iowa	2,500.00
4395	Commercial F. Ins. Co	Montgomery, Ala	2,500.00
66742	Commonwealth Mut. Ins. Co	Decatur, Ill	2,500.00
3962	Continental Ins. Co	New York	5,000.00
3968	Continental Ins. Co	New York	10,000.00
67628	Council Bluff's Ins. Co	Council Bluffs	2,000.00
47775	Est. Tex. Fire Ins. Co	New York	10,000.00
35137	German-American Ins. Co	Pittsburg, Pa	1,500.00
42039	German Ins. Co	New Orleans	5,000.00
25777	German Ins. Co	Wheeling, W. Va	1,000.00
31467	Home Ins. Co	New Orleans	10,000.00
57167	Hope Ins. Co	New Orleans	12,500.00
28204	Indiana Ins. Co	Indianapolis	2,000.00
19			
3005266	Liverpool, L. & G. Ins. Co	England	10,000.00
3005270	Liverpool, L. & G. Ins. Co	England	15,000.00
3005293	Liverpool, L. & G. Ins. Co	England	10,000.00
9525	Lumbermen's & Mfgrs.' Ins. Co	Eau Claire, Wis	2,500.00
12425	Mut. Fire Ins. Co	New York	50,000.00
55	Milwaukee Mut. F. Ins. Co	Milwaukee, Wis	2,500.00
974	Mfrs.' Mut. F. Ins. Co	Milwaukee, Wis	2,500.00
9525	Mut. F. Ass'n	Eau Claire, Wis	2,500.00
1381	Millers' Mutual Ins. Co	Manitawac, Wis	2,500.00
34595	Mfrs.' F. Ins. Co	Wheeling, W. Va	1,000.00
22	Millers' Nat. Ins. Co	Chicago, Ill	2,500.00
10344	Mut. F. Ins. Co	Chicago, Ill	5,000.00
1951	Miss. Val. Mfg. Mut. Ins. Co	Rock Island, Ia	5,000.00
159	Mfgrs'. & Mer. Mut. Ins. Co	Rockford, Ill	3,500.00
798	Mut. Union Ins. Co	Moline, Ill	2,500.00
6051	Miss. Home Ins. Co	Vicksburg, Miss	1,500.00
12071	Minneapolis Mut. F. Ins. Co	Minneapolis, Min	2,500.00
1328	Nat. Fire Ins. Co	Hartford	5,000.00
82336	New Orleans Ins. Co	New Orleans	5,000.00
2730	Oshkosh Mut. F. Ins. Co	Oshkosh, Wis	2,500.00
7995	Ohio Valley Ins. Co	Wheeling, W. Va	1,000.00
11414	Phœnix Ins. Co	Brooklyn	5,000.00
11418	Phœnix Ins. Co	Brooklyn	20,000.00
20			
11426	Phœnix Ins. Co	Brooklyn	10,000.00
17662	People's Ins. Co	New Orleans	5,000.00
42133	People's Fire Ins. Co	Middleton, Conn	1,500.00
1257699	Royal Ins. Co	England	5,000.00
3257616	Royal Ins. Co	England	20,000.00
3257639	Royal Ins. Co	England	10,000.00
4824	Reliance Mut. Ins. Co	Dubuque, Iowa	2,500.00
9277	Security F. Ins. Co	Davenport, Iowa	1,250.00
6700	Standard F. Ins. Co	Wheeling, W. Va	1,000.00
56	Wis. Mut. F. Ins. Co	Milwaukee, Wis	2,500.00
316	West'rn Mfg. Mut. F. Ins. Co	Chicago, Ill	6,000.00
7205	West'rn F. & M. Ins. Co	Sioux Falls	1,500.00

The said loss having occurred, the Merchants' Cotton Press & Storage Company, as trustee, assumed to deal with the said insurance and to apply such proportion thereof, amounting in the aggregate to $52,472.26, for the use of such owners of cotton as had dray tickets of the Merchants' Cotton Press & Storage Company, and to whom no bill of lading had been issued and who had no
21 other insurance, and each of the said defendant insurance companies admitted liability on its policy to that extent and paid to the said trustees 17.389 per cent. of the amount of its said policy.

The assumption thus to deal with the fund was a wrongful one. The Merchants' Cotton Press & Storage Company has been required by the supreme court to pay over the said fund or a ratable share of it to the carriers before the court and to hold the proportionate share which would be coming upon the theory of the liability of the C., V. & C. line for it in trust, and the said funds are now, in contemplation of law, in the possession of the Merchants' Cotton Press & Storage Company, and are the property of the C., V. & C. line and within the jurisdiction of this court.

The plaintiff The Insurance Company of North America of Philadelphia granted a policy of insurance to the Shove mills—not dated—and by the said policy of the Shove mills effected
22 insurance and did make other insurance on one hundred and fifty bales of cotton of the value of about $8,500, purchased through Jones Bros. & Co. at Memphis, Tenn., on the 9th day of November, 1887, said cotton being lost by fire in the aforesaid press. A copy of this bill of lading is herewith filed, marked Exhibit "A," and prayed to be taken as a part of this bill, but it need not be copied.

The plaintiff The Atlantic Insurance Company granted a policy to Thomas E. Brayton, treasurer, dated on September 9th, 1887, and did thereby insure all cotton for the Union Cotton Manufacturing Company, of which Thomas E. Brayton was treasurer. Fifty bales of cotton belonging to the Union Cotton Manufacturing Company were destroyed by the said fire, covered under the bills of lading of the C., V. & C. line and, while the said policy was not applicable to the said risk, the aforesaid plaintiff paid the value of the said cotton to the aforesaid Brayton. A copy of this bill
23 of lading is herewith filed, marked Exhibit "B," and prayed to be taken as part of this bill, but it need not be copied.

The plaintiff The Providence Washington Insurance Company granted its policy of insurance to the Tecumseh mills. The said mills had one hundred bales of cotton, of the value of six thousand dollars, lost in the aforesaid fire, and the Providence Washington Insurance Company paid the said loss. Copy of bill of lading is herewith filed, marked Exhibit "C," and prayed to be made part of this bill, but it need not be copied.

The policy of the Providence Washington Insurance Company may be found on pages 2271 *et seq.* of the record in the aforesaid cause of Deming against The Merchants' Cotton Press & Storage Company, that of the Insurance Company of North America on

page 2345, and that of the Atlantic Insurance Company on page 2370.

24 The aforesaid policies all had the American clause contained in them, and copies of the said policies are herewith filed, marked respectively Exhibits 1, 2, & 3, and are prayed to be taken as part of this bill, but not to be copied.

The defendant The Delaware Mutual Safety Company of Philadelphia granted its policy, dated August 8th, 1884, to Fremont and Suffolk mills, that had 500 bales of cotton covered under bill of lading of C., V. & C. line. It paid said loss and it is entitled to share in the fire insurance.

The Phœnix Insurance Company, in addition to its three fire policies, had, before the said fire, granted to R. H. Deming & Co. a policy dated on the 15th day of October, 1884, which policy is copied in the record of Deming's case on p. 2256; to the King Philip mills a policy dated March 13, 1876, which is copied

25 on the record at page 2261; *of* the Troy Cotton and Woolen Manufactory a policy dated the 13th of January, 1885, copied on the said record at p. 3414; to the Hill Manufacturing Company a policy dated November 6, 1875, copied on the said record at page 2419; to Jno. F. Parker, treasurer, a policy dated July 16th, 1886, copied on the record at page 2425, and to Chase and Shaw, on the 21st of June, 1884, a policy, which is copied on the record at page 2430. Copies of these said policies are herewith filed, marked respectively Exhibits 4, 5, 6, 7, 8, & 9. Each of the aforesaid policies contain the American clause; the opinion of the Supreme Court delivered in the case of R. H. Deming *et al.* against The Merchants' Cotton Press and Storage Company *et al.* R. H. Deming & Co. had destroyed by the said fire sundry lots of cotton covered under the bills of lading of the C., V. & C. line, a list of which, together with the value of each lot and the date of the bill of lading, being hereafter set forth:

Date bill of lading.	No. bales.	Value about.	Marks.	Destination.
26				
Oct. 19	100	$6,000.00	Coma	Northbridge, Mass.
Oct. 21	100	6,000.00	Busy	Woonsocket, R. I.
Oct. 24	100	6,000.00	Cuni	Boston, Mass.
Oct. 26	100	6,000.00	Emin	Penacook, N. H.
Oct. 27	50	3,000.00	Dido	Millville, Mass.
Nov. 3	100	6,000.00	Emas	Penacook, N. H.
Nov. 3	100	6,000.00	Curl	Woonsocket, R. I.
Nov. 4	98	5,700.00	Eigh. Jah 50, 48	Penacook, N. H.
Nov. 4	50	3,000.00	Colm	Farnumsville, Mass.
Nov. 4	100	6,000.00	Bana	Northbridge, Mass.
Nov. 5	100	6,000.00	Cubs	Putnam, Conn.
Nov. 7	100	6,000.00	Donn	Boston, Mass.
Nov. 7	25	1,500.00	Sina	E. Greenwich, R. I.
Nov. 8	100	6,000.00	Bosm	Northbridge, Mass.
Nov. 8	100	6,000.00	East	Millville, Mass.
Nov. 8	100	6,000.00	Cows	Millville, Mass.
Nov. 8	100	6,000.00	Bush	Northbridge, Mass.
Nov. 9	25	1,500.00	CIXI	N. Dighton, Mass.
Nov. 9	50	3,000.00	Bans	Northbridge, Mass.
Nov. 12	125	7,500.00	Cabe	Woonsocket, R. I.
Nov. 14	100	6,000.00	Bijo	Putnam, Conn.
Nov. 14	100	6,000.00	Ages	Putnam, Conn.
27				
Nov. 14	100	6,000.00	Asia	Putnam, Conn.
Nov. 14	106	6,360.00	Duex	Manville, R. I.
Nov. 14	100	6,000.00	Arts	Woonsocket, R. I.
Nov. 14	100	6,000.00	Army	Woonsocket, R. I.
Nov. 14	100	6,000.00	Aple	Woonsocket, R. I.
Nov. 14	100	6,000.00	Bate	Northbridge, Mass.
Nov. 15	100	6,000.00	Buzz	Putnam, Conn.
Nov. 15	50	3,000.00	Dash	Farnumsville, Mass.
Nov. 15	100	6,000.00	Dubb	Millville, Mass.
Nov. 15	25	1,500.00	Suit	E. Greenwich, R. I.

Deming & Co. recovered a judgment against the Phœnix Insurance Company for the value of the aforesaid lots of cotton in their right, and, as the assignees of the grantees of the other policies of the Phœnix Insurance Company, for the value of the lots of cotton respectively owned by the said grantees and destroyed in the aforesaid fire. Each of these lots was likewise covered under the bills of lading of the C., V. & C. Line, the date of each bill of lad-
28 ing, the value marks, and destination being as follows:

Hill Manufacturing Company.

No. bales.	Date b. l.	Value.	Marks.	Destination.
127			Ball	Lewiston, Maine.
123	Oct. 21, 1887	$12,569.73	Code	
128			Pica	
122	Oct. 26, 1887	12,595.22	Sloe	

Totokett Mills.

No. bales.	Date b. l.	Value.	Marks.	Destination.
100	.....	.....	.....	Norwich, Conn.

King Philip Mills.

No. bales.	Date b. l.	Value.	Marks.	Destination.
105	Nov. 11, 1887	86,968.47	Brix.....	Fall River, Mass.

Troy Cotton and Woolen Manufactory.

No. bales.	Date b. l.	Value.	Marks.	Destination.
100	.....	.....	.....	Fall River, Mass.

29 Copies of the said bills of lading are herewith filed, marked Exhibits 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, & 47, and prayed to be taken as a part of this bill, but they need not be copied.

The defendant The British and Foreign Marine Insurance Company granted a policy of insurance to John Collins & Sons, dated the 26th of August, 1887, a copy of which appears on the record in the Deming case, on page 2455. It likewise granted a policy to one Robinson, dated the 17th of August, 1886, copied on the aforesaid record, on page 491. The said Collins & Son and the said Robinson each had lots of cotton, covered under bills of lading, destroyed by the fire of the 17th of November, but whether either of them *were* covered under the bills of lading of the C., V. & C. line the plaintiffs are not advised.

30 The British and Foreign Marine Insurance Company had also granted a policy of insurance to Robert Jones, Jr., dated 13th of September, 1887, and another policy to C. F. Farnsworth, dated August 11th, 1887, the said policies being respectively copied in the Deming record, at pages 2514 & 2532. Although the said Robert Jones, Jr., & Co. and C. F. Farnsworth & Co. each had lots of cotton covered under bills of lading and dray tickets and destroyed by the aforesaid fire of the 17th of November, 1887, neither of said firms had any covered by the bills of lading of the C., V. & C. line.

The Union Marine Insurance Company, Limited, had granted a policy of insurance, dated the 11th of December, 1886, to one Ovenshaw. That policy is copied on the record, at page 2543. Ovenshaw had cotton destroyed by the fire of 17th of November, 1887, but not covered by the bills of lading of the C., V. & C. line.

31 The British and Foreign Marine Insurance Company also granted a policy to H. M. Bateson, dated 21st of August, 1887, copied on the Deming record, at page 2609, and the said Bateson had sundry lots of cotton, covered under the aforesaid policy, destroyed by said fire.

The Marine Insurance Company, Limited, of London, on the 18th of November, 1887, granted a policy of insurance to the Warren Manufacturing Company. The said policy is copied on the record upon the supplementary transcript of the Deming suit, at page 7. The Warren Manufacturing Company had a large lot of cotton destroyed in the aforesaid fire covered under the bills of lading of the C., V. & C. line. These several last-named marine policies all contain the American clause.

Watson, Wood & Co. had about 1,086 bales of cotton destroyed by the aforesaid fire and had a policy of insurance
32 in the Standard Marine Insurance Company, Limited, covering the risk of fire in the said press, and have been paid by the said defendant insurance company, and they and it are made defendants for the purpose of asserting any right or claim which they or either of them may have to the fire insurance carried by the compress company, the plaintiffs averring, on their behalf and on behalf of others who are entitled to stand with them and share in the said insurance fund, that neither Watson, Wood & Co. nor their said insurance company have any claim upon the aforesaid fund or the right to participate therein, because the cotton belonging to the said Watson, Wood & Co. was held under the bills of lading of the Kanawha Dispatch, which was not liable for the loss of it by fire.

33 The firm of John Sherwood & Co. had nine hundred and forty bales destroyed in the aforesaid fire, of which seven hundred were covered by the bills of lading of the Kanawha Dispatch; two hundred and forty held under the press receipts of the N. N. & M. V. R. R. Co. Sherwood & Co. had effected marine insurance with Lloyd's companies, and have been paid their loss. The said companies are brought before the court that they may assert any claim which they have to share in the fire-insurance fund or to recover in contribution anything by reason of having paid Sherwood & Co. their entire loss.

A. A. Paton & Co. had one hundred bales of cotton and marine insurance in the defendant companies, Maritime Insurance Company, Union Fire and Marine Company of New Zealand, and Ulster Marine Insurance Company. Paton & Co. lost one hundred
34 bales of cotton, covered by the bills of lading of the Kanawha Dispatch, by said fire. They have been paid their loss, and the defendant insurance companies are brought before the court because they claim an interest in the fund held in trust by the Merchants' Cotton Press and Storarge Company for contribution.

Subsequent to the fire the Merchants' Cotton Press and Storage Company conveyed a lot or parcel of land situated on Shelby street, in the city of Memphis, and known as the Senatobia-street shed and press, to the defendants Napoleon Hill and S. R.

Montgomery and T. H. Allen, Jr., to secure to the persons in contractual relations with the Merchants' Cotton Press and Storage Company the payment of the contingent liability of the Merchants' Cotton Press and Storage Company to them by reason of the failure of that company to fully insure the
35 cotton for which carriers were liable in press No. 4. The property thus set apart and conveyed was intended as a security for the payment of whatever sum might be due from the Merchants' Cotton Press and Storage Company by reason of its failure to fully insure the aforesaid cotton, and the balance of the fund upon the sale of the aforesaid property was to be applied in ratable distribution among the stockholders of the Merchants' Cotton Press and Storage Company prior to the increase of its capital stock to $1,500,000 and as a dividend to such stockholders, the said property being separated from the other properties of the said corporation. A copy of this deed is herewith filed, marked Exhibit "48," and prayed to be taken as a part of this bill, but it need not be copied.

36 The plaintiffs are informed and upon information allege that the rental value of this Senatobia-street property is about eight thousand dollars per annum, and that the said rents are being collected and a large sum is now in the hands of the aforesaid trustees, to be applied to such contingent liability.

The marine policies granted to Sherwood & Co., A. A. Paton & Co., and Watson, Wood & Co., it is believed, do not contain the American clause, but the plaintiffs aver and charge that, notwithstanding they do not contain the American clause, upon the application of the fire insurance to the carrier's liability and the cotton destroyed belonging to owners otherwise uninsured there will be no fund for contribution remaining, but, on the contrary,
37 it will appear that the Merchants' Cotton Press and Storage Company has failed to take out and collect insurance to the full value of such cotton—that is, cotton where the owner was otherwise uninsured and in contractual relations with the Merchants' Cotton Press and Storage Company or in contractual relations with a carrier liable for the loss of the cotton destroyed covered by the bills of lading, the carrier being in contractual relations with that company, and that when the application of the insurance is made the Merchants' Cotton Press and Storage Company will be liable to the plaintiffs and others in a sum approximating $100,000.

It is believed that the Merchants' Cotton Press and Storage Company failed to perform its duty in collecting the insurance which it had really taken out, and that it has continued to fail in
38 performing this duty, notwithstanding it was declared to be its duty by the chancery court of Shelby county, Tennessee, in the Coates and Lancaster mills cases, and by the supreme court of Tennessee upon the hearing of the appeal in those two cases, and again by the supreme court of Tennessee in the judgment pronounced in the Deming case.

The plaintiffs aver that by reason of the failure of the Merchants' Cotton Press and Storage Company to take out insurance in good

and solvent companies, so as to cover any loss of the cotton covered under the bills of lading of the C., V. & C. line, the Merchants' Cotton Press and Storage Company is liable to them through the liability of the C., V. & C. line and to some of the defendants in the sum of about $250,000, and this fund, to the extent that it is applicable to the liability of the said C., V. & C. line and in
39 the possession of the Merchants' Cotton Press and Storage Company within the jurisdiction of this court and the property of the C., V. & C. line, is subject to attachment.

To the end that the questions arising upon the matters and things herein set forth may be determined between the parties and the rights of all the parties may be determined, the plaintiffs file this bill in their own right and in right of all other marine insurers who may stand in their position with respect to the liability of the carrier, the said C., V. & C. line, and on their own behalf and in behalf of such insurers who choose to come in and become parties hereto they pray for copy and subpœna to issue to the resident defendants requiring them and each of them to appear and answer the allegations of this bill; that the defendant insurance
40 companies doing business in this State be served with process by service under the statute upon their respective agents; that attachment issue and be levied upon the interest of the C., V. & C. line in the trust fund held by the Merchants' Cotton Press and Storage Company, and by garnishing the defendant fire insurance companies to answer and state what, if anything, they owe upon the respective policies applicable to the liability of the C., V. & C. line, if liability shall be declared herein or by any court with the parties requisite to the validity of the judgment before such court.

And for all such defendants as may be non-residents, who have no agents here upon whom service can be had, that publication be made, and that upon a final hearing of this cause this court will decree that the C., V. & C. line is liable to the holders and
41 through the holders to the plaintiffs for the value of each of the lots of cotton covered by the plaintiff's policies and the bills of lading of the C., V. & C. line, and will apply the insurance effected by the Merchants' Cotton Press and Storage Company, uncollected, rendering proper decrees therefor against the Merchant's Cotton Press and Storage Company and the defendant fire insurance companies in exoneration of that liability, giving the proportionate share to the plaintiffs severally and to such of the defendants as stand in relation to the cotton as the plaintiffs do; that the court will enforce the trust in the Senatobia-street shed for the benefit of the plaintiffs and others, to the end that the plaintiffs and others similarly situated as the plaintiffs may be fully paid the value of the aforesaid cotton covered under their respective policies of insurance and distribute the residue, if any there be, to the
42 holders of the certificates issued by the compress company, some of which are held by defendants Napoleon Hill and S. R. Montgomery, who are called upon to produce a specimen of them, and that the said Hill is asked to furnish a list of the holders of

such certificates that they may be made parties hereto, they belonging to a numerous class and their names unknown to the plaintiffs; and the plaintiffs pray for such other relief, general and special, as may be consistent with the facts of the case and requisite and necessary in order to determine and settle all the rights of the parties to this controversy.

This is the first application for a writ of attachment.

TAYLOR AND CARROLL,
LEWIS G. FARMER,
Solicitors for Plaintiffs.

I, William A. Couthouy, agent of the Providence Washing-
43 ton Insurance Company, do certify of my personal knowledge that the Cairo, Vincennes and Chicago Railroad Company is a corporation non-resident of the State of Tennessee, and that its receivers, Anthony J. Thomas and Charles E. Tracy, are residents and citizens of the State of New York.

WILLIAM A. COUTHOUY,
Agent of the Providence Washington Insurance Co.

Subscribed and sworn before me, at Boston, Mass., the 1st day of July, 1891.

ALBERT POOR,
[SEAL.] *Notary Public.*

STATE OF TENNESSEE, }
County of Shelby. }

Personally appeared William H. Carroll, one of the attorneys for complainants in the foregoing bill, and made oath in due form of law that the matters and things therein stated are true to
44–251 the best of his knowledge, information, and belief, and that the facts therein stated are within the knowledge of affiant.

W. H. CARROLL.

Sworn to and subscribed before me July 15th, 1891.

J. P. YOUNG,
[SEAL.] *Notary Public.*

Upon the plaintiff The Insurance Company of North America giving bond in the penalty of fifteen thousand ($15,000) dollars, The Atlantic Mutual Insurance Company in the penal sum of five thousand ($5,000) dollars, and The Providence Washington Insurance Company in the penal sum of ten thousand ($10,000) dollars, the clerk and master of the chancery court of Shelby county, Tenn., will issue the attachments as prayed in the foregoing bill; the said bonds to be conditioned according to law, with two or more sureties thereon.

This July 15, '91.

J. S. GALLOWAY, *Judge.*

Copy.
Attest: T. B. CALDWELL, *D. C. M.*

(Here follow bills of lading marked pp. 132, 133, 134, 224, and 227.)

252 *Ans. & Cross-bill of Delaware M. S. Ins. Co. Filed Aug. 7, 1891.*

THE INSURANCE COMPANY OF NORTH AMERICA OF PHILADELPHIA *et al.*
versus
THE DELAWARE MUTUAL SAFETY INSURANCE COMPANY *et al.*

The answer of the Delaware Mutual Safety Insurance Company and the cross-bill of Anthony J. Thomas and Charles E. Tracy, receivers of the C., V. & C. line, for the use of the Delaware Mutual Safety Insurance Company, and the cross-bill of the Delaware Mutual Safety Insurance Company.

To the Hon. Bedford M. Estes, chancellor:

The respondent, The Delaware Mutual Safety Insurance Company, says it admits the destruction by fire on the 17th of November, 1887, in the city of Memphis, in one of the presses of the
253 Merchants' Cotton Press and Storage Company, of about 14,000 bales of cotton. It says that 570 of those bales were insured by the Tremont & Suffolk mills under a policy granted by this respondent for the sum of $200,000, being No. 17809, a copy of which is herewith filed, marked Exhibit "A" to this answer and cross-bill, and prayed to be taken as a part thereof, but not to be copied. The aforesaid policy is dated August 8th, 1884, and contains the American clause.

After the aforesaid fire and on the 20th of March, 1888, this respondent paid to the Tremont & Suffolk mills the sum of $28,187.50, the insured value of the aforesaid cotton, all of which will appear from the stipulation, a copy of which is herewith filed, marked Exhibit "B," and prayed to be taken as a part of this answer and cross-bill, but not to be copied.

254 Afterwards the Tremont & Suffolk mills instituted its suit in the chancery court of Shelby county, Tennessee, against the Merchants' Cotton Press and Storage Company, the L., N. O. & T. R. R. Co., and some of the defendant fire insurance companies, which said suit was consolidated with the case of R. H. Deming *et al.* against The Merchant's Cotton Press and Storage Company *et al.*, heard in the chancery court, and upon the appeal of the defendants heard in the supreme court. The said court held that all the carriers, except the Kanawha Dispatch, were liable to the plaintiffs and those who stood in right of the plaintiffs upon their several bills of lading and adjudged the liability in favor of the Tremont & Suffolk mills, for the use of this respondent, against the L., N. O. & T. R'y Co. in the sum of $4,343.20, being the value of 70 bales of
255 cotton covered by the bills of lading of that carrier and insured under the aforesaid policy. The remaining 500 bales of cotton so destroyed as aforesaid were covered under the bill of lading of the C., V. & C. line, dated the 10th day of November, 1887, a copy of which is filed with the bill in this cause, marked Exhibit No.

"C," the original being *in the* filed in the aforesaid cause of the Trement & Suffolk mills.

This respondent admits that the chancery court and the supreme court declared the liability of the said C., V. & C. line for the loss of the aforesaid cotton, as well as all other cotton covered under its bill of lading, but, inasmuch as the C., V. & C. line was not before the court, the court held it could not appropriate the fire insurance, under the principles of the opinion, as an indemnity to the said C.,
V. & C. line, to the holders of its bills of lading, nor would it
256 adjudge the liability against the said line.

This respondent is advised that the court ruled that the *pro rata* interests of the C., V. & C. line in the fire-insurance fund should be calculated as if it was before the court and its liability established, and in the said decree announced it would adjudge such liability if the said line was before the court.

To the end that the rights of the parties should be preserved, the court adjudged that the Merchants' Cotton Press and Storage Company was a trustee of the fire insurance; that it was its duty to collect it and to hold it to be appropriated to the liability of the C., V. & C. line if such liability should be established.

This respondent is advised that the court in its opinion determined that upon the principles adjudged there would be no
257 fund for contribution between the fire and marine insurers, but in the decree pronounced reserved the question of the appropriation of the fund between insurers entitled to contribution under the principles of the opinion in the event the liability of the C., V. & C. line should not be established.

Respondent admits that there were destroyed by fire 5,028 bales of cotton covered under the bills of lading granted by the C., V. & C. line.

Respondent admits that for the loss of the aforesaid cotton so destroyed by fire the C., V. & C. line is liable to the owners thereof respectively and to the marine insurers of such owners, the destruction by fire not being exempt by the conditions of limitation of liability contained in the bills of lading of the C., V. & C. line or in any of them.

Respondent admits that among the several lots of cotton
258 were two lots of Hooper & Buffinton and Coates & Co., and admits the judgments of the supreme court in favor of the owners of the said two lots as stated.

Respondent admits that to protect itself against any loss by reason of granting the aforesaid bills of lading upon the delivery of the cotton at the presses of the Merchants' Cotton Press and Storage Company, the C., V. & C. line and the Merchants' Cotton Press and Storage Company entered into a contract, a copy of which is accurately set forth in the original bill, and that thereafter, in performance of the obligations imposed by that contract, the Merchants' Cotton Press and Storage Company procured the policies mentioned and described in the said original bill.

Respondent admits that after the loss the Merchants' Cot-
259 ton Press and Storage Company, as trustee, assumed to deal

with the said insurance, and that it applied $52,472.26 of it to the use of such owners as held the press receipts of that company and were otherwise uninsured than by the policies of the compress company.

Respondent admits that to the extent of the percentage mentioned in the original bill the five insurance companies severally admitted their liability.

Admits, by advice of council, that this assumption upon the part of the Merchants' Cotton Press and Storage Company to pay over the said $52,472.26 was wrongful, and the supreme court has declared the said company is a trustee of the amount applicable to the liability of the C., V. & C. line and has been decreed to pay out of said fund to the carriers before the court the proper portion thereof, to wit, the sum of $3,343.28.

260 Respondent admits that the Insurance Company of North America granted a policy of insurance to the Shove mills; that a copy of it is correctly set forth, marked Exhibit "1."

That the Atlantic Mutual Insurance Company granted the policy mentioned in the bill of complaint, and that a copy of it is marked Exhibit "2."

That the Providence Washington Insurance Company granted a policy of insurance to the Tecumseh mills, a copy of which is marked Exhibit "3."

Respondent also admits the Phenix Insurance — granted to the Merchants' Cotton Press and Storage Company three policies, as set forth in the bill of complaint, and also that it granted to R. H. Deming & Co. the policy dated on the 15th day of October, 1884, copied in the record of Deming's case, on page 2256; that it granted a policy to the King Philip mills, to the Hill Manufactur-

261 ing Company, to John F. Parker, and Chase & Shaw; that the dates of the policies are correctly specified in the bill, and that Exhibits 4, 5, 6, 7, & 8 are respectively true copies of them.

Respondent admits that Deming & Co. held the cotton mentioned in the bill as destroyed by fire under the bills of lading of the C., V. & C. line, and that that firm recovered a judgment against the Phenix Insurance Company for the value of the aforesaid lots and as assignees of the holders of the other policies of the Phenix Insurance Company for the value of the other lots of cotton mentioned in the bill, each of which, it is admitted, was covered under the bill of lading of the C., V. & C. line.

Respondent admits that the defendant The British and Foreign Marine Insurance Company granted a policy of insurance to John Collins & Sons, dated the 26th of August, 1887; that it also

262 granted one to Robinson. It is not advised whether the said Robinson and Collins or either of them had cotton destroyed covered under the bills of lading of the C., V. & C. line.

Respondent also admits that the last-named insurance company granted a policy, dated the 13th of September, 1887, to Robert Jones, Jr., and another policy to C. F. Farnsworth & Co., dated August 11th, 1887, and the said policies are respectively copied in the Deming record, at pages 2514 and 2532.

Respondent admits that neither of the said assured had cotton covered under the bills of lading of the C., V. & C. line destroyed by the said fire.

Respondent admits that the said insurance company also granted a policy to H. M. Bateson, dated the 31st of August, 1887;
263 that it is copied on the Deming record, at page 2600; admits that Bateson had no cotton destroyed by the said fire covered under the bills of lading of the C., V. & C. line.

Respondent admits the granting of the Union Marine Insurance Company to Watson, Wood & Co., the granting of insurance to John Sherwood & Co. by the underwriters at Lloyd's, and to A. A. Paton & Co. by the Maritime Insurance Company, the Union Fire and Marine Insurance Company of New Zealand, and the Ulster Marine Insurance Company, and that each of the assured were the owners of the lots of cotton mentioned in the bill, and that none of the said lots were covered under the bills of lading of the C., V. & C. line.

Respondent admits that the Marine Insurance Company,
264 Limited, of London, granted a policy to the Warren Manufacturing Company mentioned in the bill, and it admits that the Warren Manufacturing Company had a large lot of cotton covered under the bills of lading of the C., V. & C. line destroyed by the said fire.

Respondent admits that subsequent to the fire the Merchants' Cotton Press and Storage Company conveyed the lot or parcel of land situated as described in the bill. Respondent is not advised as to the tenor and effect of the said instrument, marked Exhibit No. "48," but, inasmuch as it will speak for itself, it is advised it is not necessary for it to make any other response thereto.

Respondent admits that the marine policies granted to Sherwood & Co. and A. A. Paton & Co. did not contain what is known as the American clause. It is not advised as to whether the policy
265 granted to Watson, Wood & Co. does or does not contain that clause.

Respondent admits that the Merchants' Cotton Press and Storage Company has failed to collect the insurance taken out by it, as it was its duty to do. It is informed, and upon information it alleges, that instead of collecting the aforesaid insurance it made common cause with its insurers, and in violations of its obligations as the trustee took no steps to collect the insurance, and thereby, it is believed, suffered the insurance to go uncollected, so that, while several of the companies were good and solvent at the time the insurance was affected, they have since failed and by reason of the negligence of the compress company in collecting such insurance. At least $50,000 thereof has been lost to the beneficiaries of said policies.

And now, having fully answered, this respondent prays it
266 may be adjudged as entitled to share in the fire insurance fund, and that its rights may be determined in this controversy.

And now, by way of cross-bill, the C., V. & C. line and Anthony J. Thomas and Charles E. Tracy, its receivers, for the use of the

Delaware Mutual Safety Insurance Company, and Delaware Mutual Safety Insurance Company in its own right, aver that the C., V. & C. line, by its receivers, entered into a contract, copied in original bill of complaint and dated the 24th day of May, 1887, with the Merchants' Cotton Press and Storage Company and thereby did constitute the Merchants' Cotton Press and Storage Company its agent to receive, when delivered in its presses, cotton intended for transportation by the C., V. & C. line and signed receipts therefor, on which bills of lading might be issued, the said Merchants'
267 Cotton Press and Storage Company, in consideration of the compensation in said contract mentioned, agreeing and binding itself to insure the said cotton for the benefit of the C., V. & C. line to Cairo, Ill., in good and solvent companies, so as to cover any loss while the said cotton was under the control of the Merchants' Cotton Press and Storage Company and until delivered to the C., V. & C. line.

That under the aforesaid contract thus made 500 bales of cotton, marked D O W D were delivered to the Merchants' Cotton Press and Storage Company, at press No. 4, on or prior to the third day of November, 1887, by the shippers, Jones Bros. & Co., and the receipts of the Merchants' Cotton Press and Storage Company taken therefor. The said Jones Bros. & Co., having made a contract for the transportation of the aforesaid 500 bales of cotton with L. L. Fellows, the agent of the C., V. & C. line, and its receivers,
268 at Memphis, Tennessee, delivered the aforesaid press receipts to the said Fellows and received in exchange therefor the bill of lading of the C., V. & C. line, a copy of which is herewith filed, marked Exhibit "Y," and prayed to be taken as a part of this cross-bill, but not to be copied.

The said Fellows delivered the said press receipts to the Merchants' Cotton Press and Storage Company, and received therefor a receipt from that company, a copy of which is herewith filed, marked Exhibit "Z," prayed to be taken as part of this cross-bill, but not to be copied.

Upon the destruction of the aforesaid cotton the Delaware Mutual Safety Insurance Company paid to the Tremont & Suffolk mills the value of the aforesaid 500 bales of cotton in the form of a loan, stipulating in the obligation taken therefor from the aforesaid Tremont & Suffolk mills that the said Tremont & Suffolk
269 mills should forthwith institute and *persecute* suits against the transportation lines and the Merchants' Cotton Press and Storage Company, and pay to the Delaware Safety Mutual Insurance Company all sums that might be recovered from such suits and proceedings to the full amount of the loan, with interest thereon.

Pursuant to the aforesaid stipulation the Tremont & Suffolk mills, for the use of the Delaware Mutual Safety Insurance Company, filed its bill, being No. 4179 on the rule docket of the chancery court of Shelby county, Tennessee, against the Merchants' Cotton Press and Storage Company & *al.*, and prosecuted the aforesaid

bill until the same was finally determined upon an appeal to the supreme court, with the results as have been hereinbefore set forth.

The supreme court held the C., V. & C. line was liable for
270 the loss of the aforesaid five hundred bales of cotton, declared that liability, held it was the duty of compress company to collect the fire insurance and hold the same in trust until the liability of the C., V. & C. line should be established.

The supreme court held that the fact of the stipulation entered into between the Delaware Mutual Safety Insurance Company and the Tremont & Suffolk mills operated as a payment of the loss, and dismissed the suit without prejudice.

The Tremont & Suffolk mills, in farther fulfillment of its obligations to the said Delaware Mutual Safety Insurance Company, filed on the equity side of the circuit court of the United States for the southern district of Illinois, in the case of Anthony J. Thomas and Chas. E. Tracy, trustees of the Wabash, St. Louis & Pacific R. R. *et al.*, by leave of the court, its intervening petition, and did
271 thereafter enter into a stipulation with the said trustees, who were the receivers of the Cairo division of the Wabash, St. Louis & Pacific R. R. Co., commonly called the C., V. & C. line, that the intervening petition should remain on the files of the court without the necessity on the part of the receivers to take any step therein until the aforesaid suit in the chancery court should be determined in that court and if appealed to *in* the supreme court in the supreme court, and that then, if the said suit should be determined in favor of the Tremont & Suffolk mills for the use aforesaid and the levees therein in their favor satisfied, said petition should stand dismissed.

In the event it should be decided adversely to them, should such steps *should* be taken by the receiver, to the end that the controversy might be determined—

272 It was farther stipulated that in the event of a foreclosure the sale of the railroad, the property and franchises in the possession of the receivers, the rights and equities of the intervening petitioner should be protected by an appropriate decree, to the end that they should suffer no prejudice by such foreclosure sale.

The said Anthony J. Thomas and Charles E. Tracy, receivers and trustees aforesaid, and the Tremont & Suffolk mills and the Delaware Mutual Safety Insurance Company, upon the promulgation of the opinion of the supreme court in the consolidated compress cases, wherein and whereby the said court settled the rights of the parties by its solemn declaration of their liability, deemed that the necessity for a controversy no longer existed between them — the C., V. & C. line, by its said receivers, and by the approval of the Hon. Walter R. Gresham, one of the judges of the circuit court of
273 the United States for the southern district of Illinois, did, in satisfaction of the liability of the said line and the said receivers, execute and order upon the Merchants' Cotton Press and Storage Co. to the Tremont & Suffolk mills, for the use of the said Delaware Mutual Safety Insurance Company, to pay out of the insurance fund collected and to be collected and its own funds the

value of the aforesaid five hundred bales of cotton, and did set set over and assign all their rights in and to the aforesaid contract to the extent of the value of the said five hundred bales of cotton and fire-insurance policies granted to the Merchants' Cotton Press & Storage Company and insurance fund in the hands of the Merchants' Cotton Press & Storage Company to the extent of the value of the aforesaid five hundred bales of cotton, in full satisfaction of any further or future liability of the C., V. & C. line or its receivers.

274 The Merchants' Cotton Press & Storage Company declined to pay the aforesaid order and deny all liability under its aforesaid contract for the loss of the five hundred bales of cotton. A copy of the said order and assignment is herewith filed, marked Exhibits "51" and "52," and prayed to be taken as part of this cross-bill.

The receivers of the C., V. & C. line show to the court that they requested the Merchants' Cotton Press & Storage Company to collect and pay over the insurance to the owners of the cotton held under their bills of lading; that they sought by appropriate proceedings to vouch the Merchants' Cotton Press & Storage Company in and require them to defend the aforesaid intervening petition.

The said company have wholly failed to defend the said intervening petition and have, since the rendition of the opinion
275 by the supreme court of Tennessee, de*bi*ied liability to the C., V. & C. line and its receivers and have denied the right of the C., V. & C. line to participate in the insurance effected by the Merchants' Cotton Press & Storage Company.

The cross-plaintiffs are informed and upon information they allege that the Merchants' Cotton Press & Storage Co. has wholly failed to collect by its own fault at least $30,000 from the insurance companies that were good and solvent when the said fire occurred, and from whom collection could have been made if the said company had taken any steps to enforce collections.

The premises considered, the C., V. & C. line and its receivers, for the use of the Delaware Mutual Safety Insurance Company, and the Delaware Mutual Safety Insurance Company in its own right pray that a copy and subpœna may issue upon this cross-
276 bill as to the resident defendants, and that as to the non-resident defendants publication may be made requiring them and each of them to answer the allegation herein, conformably to the rules of this court, and that the parties named in the caption of the original bill and made defendants thereto be made defendants to this cross-bill, and that on final hearing the C., V. & C. line and its receivers, for the use of the Delaware Mutual Safety Insurance Company, have and recover of the Merchants' Cotton Press & Storage Company the several amounts which may appear to be due from that company by reason of the premises, both as principal and as trustee, and the trust in the Senatobia-street property be enforced by a sale thereof, and that out of the proceeds of such sale a sufficient amount be secured to the receivers, for the use

of the Delaware Mutual Safety Insurance Company, as will
277 be sufficient to make up any deficit between the insurance effected and collected by the Merchants' Cotton Press & Storage Company and the value of the aforesaid five hundred bales of cotton and interest, and that the C., V. & C. line and its receivers, for the use of the Delaware Mutual Safety Insurance Company aforesaid, and the Delaware Mutual Safety Insurance Company in its own behalf have as against the Merchants' Cotton Press & Storage Company and the other defendants hereto such other further relief as may be suitable and proper, to the end that the controversy between the parties may be finally adjudged and determined, and all general and special relief which may appear meet and proper be granted to these cross-plaintiffs.

TAYLOR & CARROLL,
Sol's for the Delaware Mutual Safety Insurance Company and for Cairo, Vincennes & Chicago Line & Anthony J.
278 *Thomas and Chas. E. Tracy, only under the Authority conferred by Exhibit "52."*
DELAWARE MUTUAL SAFETY INSURANCE COMPANY, NOW THE DELAWARE COMPANY OF PHILADELPHIA,
By LATTERALL PAULDING, *Its President.*

Attest:
[SEAL.] ALFRED HAND, *Ass't Secretary.*

STATE OF PENNSYLVANIA, }
Philadelphia. }

Personally appeared Alfred Hand, assistant secretary above named, and made oath that the foregoing allegations are true as far as made from personal knowledge, and — to those made on information and belief he believes them to be true.

Before me—

RICHARD H. REILLY,
[SEAL.] *Notary Public.*

279 STATE OF PENNSYLVANIA, }
County of Philadelphia. }

I, William B. Mann, prothonotary of the courts of common pleas of said county, which are courts of record, having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following certificate—

Do certify that Richard H. Reilly, Esquire, whose name is subscribed to the certificate of the acknowledgement of the annexed instrument and thereon written, was as the time of the acknowledgement a notary public for the Commonwealth of Pennsylvania, residing in the county aforesaid, duly commissioned and qualified to administer oaths and affirmations and to take acknowledgements and proofs of deeds or conveyances for lands, tenements, hereditaments in said State of Pennsylvania, and to all whose acts as such

full faith and credit are and ought to be given as well
280 in courts of judicature as elsewhere, and that I am well acquainted with the handwriting of the said notary public and verily believe his signature thereto is genuine; and I further certify that the said instrument is executed and acknowledged in conformity with the laws of the State of Pennsylvania.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 20th day of July, in the year of our Lord one thousand eight hundred and ninety-one.

WILLIAM B. MANN,
[SEAL.] *Prothonotary.*

Copy.
Attest: T. B. CALDWELL, *D. C., M.*

EXHIBIT "A" to Answer an- X Bill of the Deleware Mutual Safety Insurance Company & *al.*, Philadelphia.

Incorporated 1835.

No. 17809. $200,000.

281 This policy of insurance witnesseth that the Deleware Mutual Safety Insurance Company, by these presents,

Do cause Tremont & Suffolk mills to be insured in the sum of two hundred thousand dollars lost or not lost, at and from southern ports and places to mills,

For account of themselves, loss payable to J. C. Birdseye, treasurer, including fire risk on cotton intended to be shipped by steamers or sailing vessels or steam and rail combined at place of shipment for not exceeding fifteen days, without extra charge, but ¼ per cent. additional premium to be paid for each excess of fifteen days entered upon. It is understood and agreed that this policy shall not attach on shipments from New York. All rail shipments not covered by this policy unless endorsed. This policy also to attach to and from such ports and places as may be agreed upon.

282 No such risk to attach until endorsed hereon and approved by the company.

Dec. 6, '87.—Each ten bales in order of invoice subject to separate average instead of as heretofore.

Dec. 18th, '84.—Each fifty bales in order of invoice subject to separate average.

Nov. 30, '88.—From date this policy to cover shipment of cotton from New York and all rail shipments from Southern ports and places to mills (the above on margin of original copy)
or its agent in Boston. To apply to shipments per vessels sailing on and after August 8, 1884, not endorsed on policy 17375 which is hereby canceled. The company will not be liable for more than $50,000 by any one vessel nor in any one place at any one time, unless by special agreement at time of endorsement. This policy to be deemed continuous but either party to be at liberty to
283 cancel this agreement at any time, on thirty days' written notice being given, but without prejudice to any risk then

pending upon cotton, valued at invoice and ten per cent., on board the vessel or vessels, steamer or steamers or usual conveyances whereof —— —— is master for this present voyage, or whosoever else shall be master of said vessel, or by whatever other name or names the said vessel or master thereof shall be named or called.

All shipments to be reported as soon as known to the assured. Proof of loss to be authenticated by the agent of the company, if there be one at the place where such proofs are taken. Sum insured $200,000 (written on margin).

Beginning the adventure upon the said vessel as aforesaid, and upon the freight or property, from and immediately following
284 the loading of said property on board said vessel, and to continue during the voyage aforesaid on the vessel, until she shall be arrived and moored at anchor twenty-four hours in safety, and on the freight and property, until the property shall be safely landed.

And it shall be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at any ports or places, if thereunto obliged by stress of weather or other unavoidable accidents, without prejudice to this insurance, and in case of any loss or misfortune resulting from any peril insured against, the party insured engages for himself or themselves, his or their factors, servants and assigns to sue, labor travel for, and use all reasonable and proper measures for the security, presentation, relief and recovery of the property insured, or any part thereof to the charges whereof, the said company engages to contribute in proportion as the sum insured
285 bears to the whole sum at risk; and the acts of the assured or assurers, or of their joint or respective agents, in preserving, securing or saving the property insured, in case of danger or disaster, shall not be considered or held to be a waiver or acceptance of abandonment.

The company having been paid the consideration for this insurance by the assured, or his or their assigns, at the rate of—

Premiums to be fixed at time of endorsement.

Touching the adventures and perils which the said insurance company are contented to bear and take upon them; they are of the seas, fires, pirates, rovers, assailing thieves, jettisons and also barrity of the master and mariners unless the assured be owner of the vessel (embezzlement and illicit trade excepted in all cases) and such other perils, losses or misfortunes, that have or
286 shall come to the hurt, detriment or damage of the said vessel, freight or property or any part thereof, as may be assumed by this policy and expressed therein, provided, and it is expressly agreed, that the insurers shall not be liable for damage or injury to goods by dampness, change of flavor or by being spotted, discolored, rusty or mouldy, unless the same be caused by actual contact of sea water with the articles so damaged. And in case of partial loss by sea damage to dry goods, cutlery or other hardware, the loss shall be ascertained by a separation of the damaged from the undamaged portion of the damaged package or packages respectively, and the sale of the damaged portion or portions only,

and not otherwise, and the same practice shall obtain as to
287 all other merchandise, so far as practicable. In respect of loss or damage resulting from jettison or other sacrifice, and recoverable by the assumed in general average, this company shall not be held liable further than for general-average contribution, nor shall this company be held liable for contribution in general average in respect of jettison of cargo carried on deck. Whenever the contributory value in general average of the goods hereby insured shall exceed their value as expressed in this policy, this company shall be liable for such proportion only of the contributory value in general average of the goods hereby insured shall exceed their value as expressed in this policy this company shall be liable for such proportion only of the contribution as the sum hereby insured bears
288 to said contributory value and provided also that the said company shall not be liable for any claim for, or loss by, seizure, capture or detention by any foreign power, or the consequences of an attempt thereat.

It is also agreed, that bar, bundle, rod and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wickerware, willow, (manufactured or otherwise), cheese, salt, grain of all kinds, fruits, (whether preserved or otherwise), dry fish, vegetables and roots, (prepared or otherwise), rags, hempen yarn, rags, cotton bagging and other articles used for cotton bagging, pleasure carriages, household furniture, musical instruments, looking-glasses, skins and hides, and all articles perishable in their own nature, are warranted by the assured, free from average, except general) unless it happen by
289 stranding, and amount to twenty per cent. on the whole aggregate value of such articles, hemp, leaf tobacco, tobacco stems, bread, Indian meal, matting and cassia, (except in boxes), free from average, (unless general), under fifteen per cent. on the whole aggregate value of such articles; coffee in bags or bulk, pepper in bags or bulk, rice sugar, flax and saltpetre, free from average (unless general) under seven per cent. on the whole aggregate value of such articles.

And in case of loss, such loss to be paid in sixty days after proof of loss, proff of interest and adjustment exhibited to the assurers, the amount of the premium on the note given for the premium, if unpaid, and all sums due to the company from the assured, when such loss becomes due, being first deducted, and all sums
290 coming due being first paid or secured to the satisfaction of the assurers. But no loss or average shall in any case be paid under five per cent. on each passage, unless general.

Provided always, and it is further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in date to this policy, then this insurance company shall be answerable only for so much of the amount as such prior insurance may be deficient towards fully covering the premises hereby insured, without any deduction for any insolvency of all or any of the underwriters, and shall return the premium upon so much of the sum by them insured, as they shall be by such prior in-

291 surance exonerated from, and in case of any insurance upon the said premises subsequent in date to this policy.

Nov. 21st, 1888.—Optional with assured on the declaration of scrip dividend at the end of current fiscal year to receive same, or in lieu thereof, twenty per cent. rebate in cash from amount of net premium for the year. (Written on margin.)

This insurance company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received in the same manner as if no such subsequent assurance had been made.

It is also agreed, that the vessel, freight or property be warranted by the assured free from any charge, damage or loss which
292 may arise in consequence of seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war; and also free from any charge, damage loss or claim on account of injury to any other vessel or her cargo, arising from collision of the vessel herein named with such other vessel.

It is further agreed, that in case a total loss shall be claimed for or on account of any damage or charge to the said vessel, the only basis for ascertaining her value, shall be her valuation in this policy, and if not valued herein, then her actual value at the port to which she belonged at the time of the inception of this risk.

And it is also agreed, that if the above-named vessel, upon a regular survey, shall be declared unseaworthy by reason of her being unsound or rotten, then the assurers shall not be responsible on this policy. And if the voyage aforesaid shall have been begun
293 and shall have terminated, before the date of this policy, then there shall be no return of premium on account of such termination of the voyage.

And it is further agreed, that one-third shall be deducted from the cost of all repairs of injuries and losses on the vessels by the perils insured against (except on anchors and copper) as a commutation for the average difference between new and old, the remains of all articles replaced being considered as salvage, and accordingly deducted from the net loss. And instead of deducting one-third from the cost of recoppering, there shall be deducted two and one-half per cent. of the net cost of recoppering, after deducting the value of the old copper and nails, for each and every month the copper shall have been on the vessel at the time when it is taken off, and if the copper shall have been on forty months or more, the cost of recoppering shall be wholly excluded. If a techni-
294 cal loss be claimed similar deductions shall be made from the estimated repairs, and unless the net cost thereof (exclusive of salvage charges) would exceed a variety of the value of the vessel, after making such deductions, the loss shall be deemed partial only.

It is also agreed that when the goods insured arrive at this port, no claim for loss or damage shall be allowed unless the assured or consignee, give notice to this company of the same, within ten days

after the landing, and also of any public sale intended to be made in consequence of such loss or damage, at least two days previous to such sale, and that the company are not liable for loss or damage by wet, breakage, leakage, or exposure on goods insured as on deck.

It is also agreed, that no liability is incurred under this
295 policy for leakage on molasses or other liquids unless occasioned by stranding or collision with another vessel.

It is further agreed that the assured shall not abandon in consequence of the port of destination being blockaded, but the vessel shall in such case have the liberty to proceed to another port not blockaded, which shall be substituted for the blockaded port.

It is also agreed that in all cases of return premium for short property or overinsurance, ten per cent. of the return premium shall be retained by the assurers.

It is also agreed that no assignment of this policy shall be valid unless the premium has been paid or the note given therefor is further secured by a previous endorsement of the person or persons for whose benefit said assignment is intended, and unless the consent of the insurers be first obtained.

296 In witness whereof, the said corporation have hereunto affixed their seal and caused these presents to be signed by their agent. WM. V. HITCHINGS, *Agent.*

EXHIBIT 51 to Answer and Cross-bill of the Delaware Mutual Safety Company *et al.*

To the president and directors of the Merchants' Cotton Press & Storage Company of Memphis, Tennessee:

You will please pay to the Tremont & Suffolk mills, for the use of the Delaware Mutual Assurance Company, or to Julius A. Taylor and Wm. H. Carroll, their attorneys, the amount due for the destruction by fire, on or about the 17th of November, 1887, of five hundred
297 bales of cotton then in your possession in press No. 4, in Memphis, Tennessee, and covered by our bills of lading No. 90, issued by the Cairo Vincennes & Chicago line to Jones Bros. & Co., under date the 3rd day of November, 1887, marked D O N G, with Jones underneath it, shipped to order, Lowell, Massachusetts, notify the Tremont & Suffolk mills, and out of the insurance funds in your hands already collected and to be collected and out of your own funds and in exoneration of all liability to us by reason of the destruction by fire of the said five hundred bales of cotton while yet in your possession and covered by your contract with use of the 24th of May, 1887.

Dated June 22nd, 1891.

ANTHONY J. THOMAS, [SEAL.]
CHARLES E. TRACY, [SEAL.]
298 *Receivers of the Cairo Division of the W., St. Louis & P. R. R. Co.*
WALTER B. HORN,
Notary Public, Kings Co.

Ctf. filed in New York Co.

EXHIBIT 52 to Answer and Cross-bill of the Deleware Mutual Safety Insurance Co. & *al.*

Know all men by these presents that whereas the Tremont & Suffolk mills, a corporation by virtue of the laws of the State of Massachusetts, about the 3rd day of November, 1887, purchased of R. H. Deming & Co., of Providence, R. I., through Jones Bros. & Co., of Memphis, Tennessee, five hundred bales of cotton marked D O N G, with Jones underneath, to be landed at Lowell,
299 Massachusetts, at 9⅞ cents per pound, and the said Jones Bros. & Co. thereafter delivered the said cotton at press No. 4 of the Merchants' Cotton Press & Storage Company and received its receipts therefor and thereafter delivered the said receipts to the agent of the Cairo, Vincennes & Chicago line, in the employ of Anthony J. Thomas and Chas. E. Tracy, receivers of the Cairo division of the Wabash, St. Louis & Pacific r'y, then commonly known as the Cairo, Vincennes & Chicago line, who delivered the aforesaid dray tickets to the Merchants' Cotton Press and Storage Company, and granted the bill of lading of the Cairo, Vincennes & Chicago line to Jones Bros. & Co. in behalf of the said receivers, covering the said five hundred bales of cotton specified as
300 weighing 246,047 pounds, and thereby agreeing to transport the said five hundred bales of cotton to Lowell, Mass., to order, notify the Tremont & Suffolk Mills, for 53½ cents per one hundred pounds;

And whereas the shippers, Jones Bros. & Co., thereupon drew on the Tremont & Suffolk mills for the cost price of the cotton at Memphis, Tennessee, namely, for the sum of $22,365.68, and attached a bill of exchange to a bill of lading endorsed, and the said draft was duly paid by the Tremont & Suffolk mills on or about the 9th of November, 1887, and the said five hundred bales of cotton *was* destroyed by fire, while yet in the Merchants' Cotton Press & Storage Co.'s press and possession, on the 17th of November
301 and was covered under and protected by certain contract made and entered into of the 24th of May, 1887, by and between the Cairo, Vincennes & Chicago line, through its said receivers, and the Merchants' Cotton Press & Storage Company, to common carriers and transportation lines in like cases for cotton destroyed in the aforesaid fire and covered by bills of lading issued by such common carriers and transportation lines has been fixed, established, and declared by the chancery court of Shelby county, Tennessee, and by the supreme court of the State of Tennessee, in all of the cases in which common carriers and transportation lines are liable to the consignees and owners of the said cotton so
302 destroyed by fire, while yet in the possession of the said compress company, where the contractual relations between the compress Co. and carrier transportation company exists;

And whereas the chancery court of Shelby county, Tennessee, has declared in its decree in the consolidated compress cases the liability of the receivers of the said Cairo, Vincennes — Chicago line for

cotton covered by their bills of lading and destroyed by fire in the aforesaid press while yet in the possession of the said compress company, and the supreme court of Tennessee upon appeal has affirmed the said declaration of liability;

303 And whereas the Tremont & Suffolk mills and the Delaware Mutual Insurance Co., whose policy covered the aforesaid five hundred bales of cotton, and the Cairo, Vincennes & Chicago line and its said receivers desire to avoid a multiplicity of suits and to save all other further expense and litigation, the said Tremont & Suffolk mills, for the Delaware Mutual Insurance Company, accepts from the said receivers, Anthony J. Thomas and Chas. E. Tracy, an order upon the Merchants' Cotton Press and Storage Company to pay to the said Tremont & Suffolk mills for the use of the said Delaware Mutual Insurance Co., or to Julius A. Tay-
304 lor and Wm. A. Carroll, their attorneys, the amount due for the loss and destruction of the aforesaid five hundred bales of cotton, with interest thereon, out of the insurance fund received and to be received and out of its own funds in exoneration of all liability arising out of the destruction of the aforesaid five hundred bales of cotton upon the part of the Merchants' Cotton Press and Storage Company to the said receivers as such, and in full of all the obligations of the said receivers to the Tremont & Suffolk mills for the destruction of the aforesaid cotton, and of any and all other future or further liability on account thereof to the said Tremont & Suffolk mills or Delaware Mutual Assurance Co.;

Now, therefore, in consideration of the premises and of one dollar to it in hand paid, we, the Cairo, Vincennes & Chicago line, by the said Anthony J. Thomas and Charles E. Tracy, receivers, do hereby transfer, assign, and set over unto the Tremont & Suffolk
305 mills, for the use of the Delaware Mutual Assurance Company, all our rights, titles, claims, demands, and interest in or under or accruing by means of the said written contract of the 24th of May, 1887, between the said Merchants' Cotton Press & Storage Co. and the receivers to the extent and value of the aforesaid five hundred bales of cotton, so far as it may cover and relate to the said five hundred bales of cotton hereinabove mentioned, and to the extent of transferring to the extent and value of the said five hundred bales of cotton aforesaid, all of our rights, claims, demands, and rights of action over against the said Merchants' Cotton Press & Storage Company growing out of and accruing from the possession by the said Merchants' Cotton Press & Storage Company of the said five hundred bales of cotton when they were destroyed by fire as aforesaid

And we do hereby further assign, transfer, and set over to
306 the said Tremont & Suffolk mills for the use of the Delaware Mutual Assurance Company all of our right, title, interest, and claim in and to the insurance fund in the possession of the Merchants' Cotton Press & Storage Company or which may be paid it or is recovered or recoverable from any person or persons whatsoever, and all our interest in the policies of insurance issued to the Merchants' Cotton Press and Storage Co. to the extent and on account

of the said five hundred bales of cotton hereinabove mentioned, and we do hereby constitute the Tremont & Suffolk mills, for the use of the Delaware Mutual Assurance Co., our attorney irrevocable, with power of substitution in our name, if so desired, but at the expense of the Delaware Mutual Assurance Company for their benefit, to make demand, enter upon, and prosecute any and all suits at law, in equity, or otherwise which may be deemed necessary and
307 proper to enforce the said agreement or to enforce the liability of the Merchants' Cotton Press & Storage Company or any other person or persons, corporation or corporations, whatsoever that may be or be adjudged to be liable therefor, and to execute in our behalf acquittances to the Merchants' Cotton Press & Storage Company for all sums paid upon our order by said company on account of the said five hundred bales of cotton hereinbefore mentioned to the extent of the value thereof, with interest.

And the said Tremont & Suffolk mills and the Delaware Mutual Assurance Company do hereby accept this assignment, covenant, and contract, and the order directed to the president and directors of the Merchants' Cotton Press & Storage Company herein to the value of the aforesaid five hundred bales of cotton, and as a full, final, and complete discharge to the said receivers of any and
308 all other future or further liability or obligation to the said Tremont & Suffolk mills or the Delaware Mutual Assurance Co., the parties hereto agreeing by the decision of the supreme court of Tennessee hereinbefore referred to, the rights and liabilities of the parties were fixed and determined, and the necessity for any other or future litigation between them no longer exists.

Dated June 22nd, 1891.

ANTHONY J. THOMAS, [SEAL.]
CHAS. E. TRACY, [SEAL.]
Receivers of the Cairo Division of the W., St. L. & R. R. R.

Witness:
J. F. SAWAAL.

STATE OF NEW YORK,)
City & County of New York.)

On this 22nd day of June, in the year one thousand eight
309 hundred and ninety-one, before me personally came Anthony J. Thomas and Chas. E. Tracy, receivers of the Cairo division of the Wabash, St. Louis & Pacific r'y, to me known and known to me to be the individuals described in and who executed the foregoing instrument, and acknowledged to me that they executed the same as their act and deed and as such receivers.

WALTER B. HORN,
[SEAL.] *Notary Public, Kings Co.*

Certificate filed in New York Co.

STATE OF NEW YORK, }
City & County of New York. }

I, Leonard A. Giegerich, clerk of the city and county of New York and also clerk of the supreme court of the said city and county, the same being a court of records, do hereby certify that Walter B. Horn has filed in the clerk's office of the county
310 of New York a certified copy of his appointment as notary public for the county of Kings, autograph signature, and was at the time of taking proof or acknowledgement of the annexed instrument duly authorized to take the same, and, further, that I am well acquainted with the handwriting of such notary, and verily believe the signature to the said certificate of proof or acknowledgement to be genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 22nd day of June, 1891.

LEONARD A. GIEGERICK, *Clerk.*

Attachment Issued 8th Day of August, 1891, to the Sheriff of Shelby County.

Whereas the Insurance Company of North America *et al.* filed their bill in the chancery court of Shelby county against the
311 Delaware Mutual Insurance Company, the C., V. & C. line *et al.* and obtained from Hon. J. S. Galloway, judge, an order for the issuance of an attachment against the estate of the said C., V. & C. line (Cairo, Vincennes & Chicago line), and bond having been given as required by law in attachment cases: You are therefore commanded to attach of the estate of the said C., V. & C. line to satisfy the claim of complainant and others, which is alleged in the bill to be about $250,000, together with the cost of this cause, the following-described property, to wit, the interest of the C., V. & C. line in the fund held by the Merchants' Cotton Press & Storage Company, and by garnishing the defendant fire insurance companies to answer and state what, if anything, they owe upon their respective policies applicable to the liabilty of the C., V. & C. line, if
312 liability shall be declared herein or by any court with the parties requisite to the validity of the judgment before such court, a list of said defendant fire insurance companies being hereto attached and made a part of this writ, and such estate, unless replevined, sold to secure —; that the same may be liable to further proceedings thereon, to be had at the said court, to be held for the county of Shelby on the first Monday in September next, at the court-house, in the city of Memphis, when and where you will make known how you have executed this writ.

Witness E. B. McHenry, clerk and master of our said court,
313 at office, in the city of Memphis, the 1st Monday in April, 1891.

E. B. McHENRY,
Clerk and Master,
By T. B. CALDWELL,
Deputy Clerk and Master.

Came to hand August 8th, 1891, and executed August 10th, 1891, by levying this attachment by garnishment upon the Phenix Insurance Company, the Merchants' Cotton Press & Storage Company, the Royal Insurance Company, the Ætna Fire & Marine Insurance Company, the Continental Insurance Company, the Fire Association, the German-American Insurance Company, Home Insurance Company of Louisiana, the Liverpool, London & Globe Insurance Company, the Mississippi Home Insurance
314 Company, and the National Fire Insurance Company. Copies of said garnishments are herewith filed and referred to as a part of this return. The remaining within-named parties are not to be found in my county.

August 31st, 1891.

A. J. McLEONDON, *Sheriff*,
By G. W. BLACKWELL, *D. S.*

List of Defendant Fire Insurance Companies.

The Phenix Insurance Company.
The Royal Insurance Company.
The Ætna Fire & Marine Insurance Company.
The Capital City Fire Insurance Company.
The Central Manufacturers' Insurance Company.
The Citizens' Mutual Insurance Company.
The Commercial Fire Insurance Company.
The Commonwealth Mutual Insurance Company.
315 The Continental Insurance Company.
The Council Bluffs Insurance Company.
The Fire Association.
The German Insurance Company.
The German-American Insurance Company.
The German Fire Insurance Company.
The Home Insurance Company of Louisiana.
The Hope Insurance Company.
The Indiana Insurance Company.
The Liverpool, London & Globe Insurance Company.
Lumbermen & Manufacturers' Insurance Company.
The Mutual Fire Insurance Company.
The Milwaukee Mutual Fire Insurance Company.
The Manufacturers' Mutual Fire Insurance Company.
The Mutual Fire Association.
Millers' Mutual Insurance Company.
316 Manufacturers' Fire Insurance Company.
Millers' National Insurance Company.
Mutual Fire Insurance Company.
The Mississippi Valley Manufacturers' Mutual Insurance Company.
The Manufacturers' & Merchants' Insurance Campany.
The Mutual Insurance Company.
The Mississippi Home Insurance Company.
The Minneapolis Mutual Fire Insurance Company.

The National Fire Insurance Company.
The New Orleans Insurance Company.
The Oshkosh Mutual Fire Insurance Company.
The Ohio Valley Insurance Company.
The People's Insurance Company.
The People's Fire Insurance Company.
The Reliance Mutual Insurance Company.
The Security Fire Insurance Company.
The Standard Fire Insurance Company.
The Wisconsin Mutual Fire Insurance Company.
317 The Western Manufacturers' Mutual Fire Insurance Company.
The Western Fire & Marine Insurance Company.
The Rhenest Westphalian Insurance Company, Lloyd's.
The Union Fire & Marine Company of New Zealand.
The Underwriters at Lloyd's.

STATE OF TENNESSEE, *Shelby County.*

INS. CO. OF N. A. *et al.* *vs.* DELEWARE MUT. INS. CO. & *al.*

In the Chancery Court of Shelby County, Tennessee.

Garnishment Executed by Virtue of an Attachment Issued from said Court, Returnable to the April Term, 1891.

To Phenix Insurance Company:

318 You are hereby summoned to be and personally appear before the judge of the chancery court of Shelby county, Tennessee, at a term of said court to be held at the court-house, in Memphis, on the first Monday in September, 1891, and then — there to answer and state what, if anything, you owe upon your policy or policies applicable to the liability of the defendant Cairo, Vincennes & Chicago Line, if liability shall be declared herein or by any court with the parties requisite to the validity of the judgment before such court; and I hereby notify you that all the property, money, goods, and effects of said defendant now in your custody or possession *has* been attached or levied on to satisfy an attachment issued in said cause in favor of the plaintiff and against the above-named defendant.

319 And I also notify you not to pay to said defendant any debt now due or hereafter to become due, but to retain possession of the same and all property and effects of the said defendant which are now or may hereafter come under your control or into your possession until you have made full *ander* to this garnishment or been fully discharged by order of the said court.

Done at my office, in Memphis, Tennessee, this 10th day of August, 1891.

A. J. McLENDON,
Sheriff of Shelby Co.,
By G. W. BLACKWELL,
Deputy Sheriff.

Executed the within garnishment on the Phenix Insurance Company the 10th day of August, 1891, by making known the contents thereof to C. Green, of firm of Green, Montidonico & Co., agents for the said Phenix Insurance Company, and delivering to him a true copy of same.

A. J. McLENDON, *Sheriff*,
By G. W. BLACKWELL, *D. S.*

320 STATE OF TENNESSEE, }
Shelby County. }

In the Chancery Court of Shelby County, Tennessee.

INS. CO. OF N. A. & *al.* }
versus }
DELAWARE M. S. INS. CO. *et al.* }

Garnishment Executed by Virtue of an Attachment Issued from said Court, Returnable to the April Term, 1891.

To the Merchants' Cotton Press & Storage Company:

You are hereby summoned to be and personally appear before the judge of the chancery court of Shelby county, Tennessee, at a term of said court to be held at the court-house, in Memphis, on the first Monday in September, 1891, and then — there to answer as garnishee in the above-entitled case, on oath, such questions as may be asked you in relation to money, capital, or effects of defend-
321 ants Cairo, Vincennes & Chicago Line in the above-stated case.

And I hereby notify you that all the interest of the C., V. & C. line in the trust fund held by you has been attached or levied on to satisfy an attachment issued in said cause in favor of the plaintiff and against the above-named defendant.

And I also notify you not to pay to said defendant any debt now due or hereafter to become due, but to retain possession of the same and all property and effects of the said defendant which are now or may hereafter come under your control or into your possession until you have made full answer to this garnishment or been fully discharged by order of the said court.

Done at my office, in Memphis, Tennessee, this 10th day of August, 1891.

A. J. McLENDON,
Sheriff of Shelby County,
By G. W. BLACKWELL, *D. S.*

322 Executed the within garnishment on the Merchants' Cotton Press & Storage Company the 10th day of August, 1891, by making known the contents thereof to S. R. Montgomery, manager, and delivering to him a true copy of same.

A. J. McLENDON, *Sheriff*,
By G. W. BLACKWELL, *D. S.*

STATE OF TENNESSEE, }
Shelby County. }

In the Chancery Court of Shelby County, Tenn.

INS. CO. OF N. A. & *al.* }
versus
DELAWARE M. S. INS. CO. & *al.* }

Garnishment Executed by Virtue of an Attachment Issued from said Court, Returnable to the April Term, 1891.

To Royal Insurance Company:

You are hereby summoned to be and personally appear
323 before the judge of the chancery court of Shelby county, Tennessee, at a term of said court to be held at the court, —in Memphis, on the first Monday in September, 1891, and then — there to answer and state what, if anything, you owe upon your policy or policies applicable to the liability of the defendant Cairo, Vincennes & Chicago Line, if liability shall be disclosed herein or by any court with the parties requisite to the validity of the judgment before such court; and I hereby notify you that all the property, money, goods, and effects of said defendant now in your custody or possession *has* been attached or levied on to satisfy an attachment issued in said cause in favor of the plaintiff and against the above-named defendant.

And I also notify you not to pay the said defendant any debt now due or hereafter to become due, but to retain possession of the same and all property and effects of said defendant which
324 are now or may hereafter come under your control or into your possession until you have made full answer to this garnishment or been fully discharged by order of the said court.

Done at my office, in Memphis, Tennessee, this 10th day of August, 1891.

A. J. McLENDON,
Sheriff of Shelby County, Tenn.,
By G. W. BLACKWELL, *D. S.*

Executed the within garnishment on the Royal Insurance Company the 10th day of Aug., 1891, by making known the contents thereof to C. Green, of the firm of Green & Montidonico, agents for the above-named Royal Insurance Company, and delivering to him a true copy of same.

A. J. McLENDON, *Sheriff*.
G. W. BLACKWELL, *D. S.*

325 STATE OF TENNESSEE, }
Shelby County. }

In the Chancery Court of Shelby County, Tennessee.

INS. CO. OF N. A. & *al.* }
versus
DELEWARE M. S. INS. CO. & *al.* }

Garnishment Executed by Virtue of an Attachment Issued from said Court, Returnable to the April Term, 1891.

To Ætna Fire & Marine Insurance Company:

You are hereby summoned to be and personally appear before the judge of the chancery court of Shelby county, Tennessee, at a term of said court to be held at the court-house, in Memphis, on the 1st Monday in September, 1891, and then — there to answer and state what, if anything, you owe upon your policy or poli-
326 cies applicable to the liability of the defendant Cairo, Vincennes & Chicago Line, if liability shall be declared herein or by any court with the parties requisite to the validity of the judgment before such court; and I hereby notify you that all the property, money, goods, and effects of said defendant now in your custody or possession *has* been attached or levied on to satisfy an attachment issued in said cause in favor of the plaintiff and against the above-named defendant.

And I also notify you not to pay to said defendant any debt now due or hereafter to become due, but to retain possession of the same and all property and effects of the said defendant which are now or may hereafter come under your control or into your possession until you have made full answer to this garnishment or been
327 fully discharged by order of the said court.

Done at my office, in Memphis, Tennessee, this 10th day of Aug., 1891.

A. J. McLENDON,
Sheriff of Shelby County,
By G. W. BLACKWELL, *D. S.*

Return.

Executed the within garnishment on the Ætna Fire & Marine Insurance Company on the 10th day of Aug., 1891, by making known the contents thereof to E. Mason, of C. E. Mason & Sons, agent for the said Ætna Fire and Marine Insurance Company, and delivering to him a true copy of same.

A. J. McLENDON, *Sheriff,*
By G. W. BLACKWELL, *D. S.*

STATE OF TENNESSEE, }
Shelby County. }

In the Chancery Court of Shelby County, Tennessee.

INS. CO. OF N. A. & *al.* }
versus
DELAWARE MUTUAL S. INS. CO. & *al.* }

328 *Garnishment, Executed by Virtue of an Attachment Issued from said Court, Returnable to the April Term*, 1891.

To Continental Insurance Company:

You are hereby summoned to be and personally appear before the judge of the chancery court of Shelby county, *of* Tennessee, at a term of said court to be held at the court-house, in Memphis, on the first Monday in September, 1891, and then — there to answer *and* what, if anything, you owe upon your policy or policies applicable to the liability of the defendant Cairo, Vincennes & Chicago Line, if liability shall be declared herein or by any court with the parties requisite to the validity of the judgment before such court.

329 And I hereby notify you that all the property, money, goods, and effects of said defendant now in your custody or possession *has* been attached or levied on to satisfy an attachment issued in said cause in favor of the plaintiff and against the above-named defendant.

And I also notify you not to pay to said defendant any debt now due or hereafter to become due, but to retain possession of the same and all property and effects of the said defendant which are now or may hereafter come under your control or into your possession until you have made full answer to this garnishment or been fully discharged by order of the said court.

Done at my office, in Memphis, Tennessee, this 10th day of August, 1891.

A. J. McLENDON,
Sheriff of Shelby County.
G. W. BLACKWELL,
Deputy Sheriff.

330 *Return of Sheriff.*

Executed the within garnishment on the Continental Insurance Company on the 10th day of Aug., 1891, by making known the contents thereof to C. Green, of Green and Montidonico, agents for the above-named Continental Insurance Company, and delivering to him a true copy of same.

A. J. McLENDON, *Sheriff,*
By G. W. BLACKWELL, *D. S.*

STATE OF TENNESSEE, }
Shelby County. }

In the Chancery Court of Shelby County, Tennessee.

INS. CO. OF N. A. & *al.* }
versus
DELEWARE M. S. INS. CO. & *al.* }

Garnishment Executed by Virtue of an Attachment Issued from said Court, Returnable to the April Term, 1891.

331 To — Fire Association:

You are hereby summonod to be and personally appear before the judge of the chancery court of Shelby county, Tennessee, at a term of said court to be held at the court-house, in Memphis, on the first Monday in September, 1891, and then — there to answer and state —, if anything, you owe upon your policy or policies applicable to the liability of the defendant Cairo, Vincennes & Chicago Line, if liability shall be declared here or by any court with the parties requisite to the validity of the judgment before such court; and I hereby notify you that all the property, money, goods, and effects of said defendant now in your custody or possession have
332 been attached or levied on to satisfy an attachment issued in said cause in favor of the plaintiff and against the above-named defendant.

And I also notify you not to pay the said defendant any debt now due or hereafter to become due, but to retain possession of the same and all property and effects of the said defendant which are now or may hereafter come under your control or into your possession until you have made full answer to this garnishment or been fully discharged by order of the said court.

Done at my office, in Memphis, Tennessee, this 10th day of August, 1891.

A. J. McLENDON,
Sheriff of Shelby County.
By G. W. BLACKWELL,
Deputy Sheriff.

333 *Return of Sheriff.*

Executed the within garnishment on the — Fire Association on the 10th day of Aug., 1891, by making known the contents thereof to C. P. Murphy, of firm of Murphy & Murphy, agents for the said — Fire Association, and delivering to him a true copy of same.

A. J. McLENDON, *Sheriff.*
G. W. BLACKWELL, *D. S.*

334 STATE OF TENNESSEE, }
Shelby County. }

In the Chancery Court of Shelby County, Tennessee.

INS. CO. OF N. A. & *al.* }
versus
DELAWARE M. S. INS. CO. & *al.* }

Garnishment Executed by Virtue of an Attachment Issued from said Court, Returnable to the April Term, 1891.

To the German-American Insurance Company:

You are hereby summonsed to be and personally appear before the judge of the chancery court of Shelby county, Tennessee, at a term of said court to be held at the court-house, in Memphis, on the first Monday in September, 1891, and then — there to answer and state what, if anything, you owe upon your policy or policies
335 applicable to the liability of the defendant Caifo, Vincennes & Chicago Line, if liability shall be declared by any court with the parties requisite to the validity of the judgment before such court; and I hereby notify you that all the property, money, goods, and effects of said defendant now in your custody or possession *has* been attached or levied on to satisfy an attachment issued in said cause in favor of the plaintiff and against the above-named defendant.

And I also notify you not to pay to said defendant any debt now due or hereafter to become due, but to retain possession of the same and all property and effects of the said defendant which are now or may hereafter come under your control or into your possession until you have made full answer to this garnishment or been
336 fully discharged by order of said court.

Done at my office, in Memphis, Tenn., this 10th day of August, 1891.

A. J. McLENDON,
Sheriff of Shelby Co.
G. W. BLACKWELL,
Deputy Sheriff.

Return of Sheriff.

Executed the within garnishment of the German-American Insurance Company on the 10th day of Aug., 1891, by making known the contents thereof to Thomas Welford, agent for the said German-American Insurance Company, and delivering to him a true copy of same.

A. J. McLENDON, *Sheriff*,
By G. W. BLACKWELL, *D. S.*

STATE OF TENNESSEE,)
Shelby County.)

337 In the Chancery Court of Shelby County, Tennessee.

INS. CO. OF N. A. & *al.*)
versus
DELAWARE M. S. INS. CO. & *al.*)

Garnishment Executed by Virtue of an Attachment Issued by the Said Court, Returnable to the April Term, 1891.

To Liverpool, London & Globe Insurance Company:

You are hereby summonsed to be and personally appear before the judge of the chancery court of Shelby county, Tennessee, at a term of said court to be held at the court-house, in Memphis, on the first Monday in September, 1891, and then — there to answer and state what, if anything, you owe upon your policy or policies applicable to the liability of the defendant Cairo, Vincennes &
338 Chicago Line, if liability shall be declared herein or by any court with the parties requisite to the validity of the judgment before such court; and I hereby notify you that all the property, money, goods, and effects of said defendant now in your custody or possession *has* been attached or levied on to satisfy an attachment issued in said cause in favor of the plaintiff and against the above-named defendant.

And I also notify you not to pay to said defendant any debt now due or hereafter to become due, but to retain possession of the same and all capital and effects of the said defendant which are now or may hereafter come under your control or into your possession until you have made full answer to this garnishment or been fully discharged by order of the said court.

339 Done at my office, in Memphis, Tennessee, this 10th day of August, 1891.

A. J. McLENDON,
Sheriff of Shelby County,
By G. W. BLACKWELL,
Deputy Sheriff.

Return of Sheriff.

Executed the within garnishment on the Liverpool, London and Globe Insurance Company on 10th day of August, 1891, by making known the contents thereof to C. Green, of firm of Green and Montidonico, agents for the said Liverpool, London & Globe Insurance Co., and delivering to him a true copy of same.

A. J. McLENDON, *Sheriff,*
By G. W. BLACKWELL, *D. S.*

STATE OF TENNESSEE,)
Shelby County.)

In the Chancery Court of Shelby County, Tennessee.

340 INS. CO. OF N. A. *et al.*)
versus)
DELAWARE M. S. INS. CO. & *et al.*)

To Mississippi Home Insurance Company:

You are hereby summoned to be and personally appear before the judge of the chancery court of Shelby county, Tenn., at a term of said court to be held at the court-house, in Memphis, on the first Monday in September, 1891, and then and there to answer and state what, if anything, you owe upon your policy or policies applicable to the liability of the defendant Cairo, Vincennes and Chicago Line, if liability shall be declared herein or by any court with the parties requisite to the validity of the judgment before such court; and I hereby notify you that all the prop-
341 erty, money, goods, and effects of said defendant now in your custody or possession *has* been attached or levied on to satisfy an attachment issued in said cause in favor of the plaintiff and against the above-named defendant.

And I also notify you not to pay to said defendant any debt now due or hereafter to become due, but to retain possession of the same and all property and effects of the said defendant which are now or may hereafter come under your control or into your possession until you have made full answer to this garnishment or been fully discharged by order of the said court.

Done at my office, in Memphis, Tenn., this 10th day of August, 1891.

A. J. McLENDON,
Sheriff of Shelby Co.,
By G. W. BLACKWELL,
Deputy Sheriff.

Return of Sheriff.

342 Executed the within garnishment on the Mississippi Home Insurance Company on the 10th day of August, 1891, by making known the contents thereof to W. L. Parker, agent for the said Mississippi Home Insurance Company, and delivering to him a true copy of same.

A. J. McLENDON, *Sheriff*,
By G. W. BLACKWELL, *D. S.*

STATE OF TENNESSEE, }
Shelby County. }

In the Chancery Court of Shelby County, Tennessee.

INS. CO. OF N. A. & *al.*
versus.
DELAWARE M. S. INSURANCE CO. & *al.*

Garnishment Executed by Virtue of an Attachment Issued from said Court, Returnable to the April Term, 1891.

To National Fire Insurance Company:

343 You are hereby summonsed to be and personally appear before the judge of the chancery court of Shelby county, Tennessee, at a term of said court to be held at the court-house, in Memphis, on the first Monday in September, 1891, and then and there to answer and state what, if anything, you owe upon your policy or policies applicable to the liability of the defendant Cairo, Vincennes & Chicago Line, if liability shall be declared herein or by any court with the parties requisite to the validity of the judgment before such court.

And I do hereby notify you that all the property, money, goods, and effects of said defendant now in your custody or possession *has* been attached or levied on to satisfy an attachment issued in said cause in favor of the plaintiff and against the above-named defendant.

344 And I also notify you not to pay to said defendant any debt now due or hereafter to become due, but to retain possession until you have made full answer to this garnishment or been fully discharged by order of the said court.

Done at my office, in Memphis, Tenn., this 10th day of August, 1891.

A. J. McLENDON,
Sheriff of Shelby County,
By G. W. BLACKWELL,
Deputy Sheriff.

Return of Sheriff.

Executed the within garnishment on the National Fire Insurance Co. on the 1st day of August, 1891, by making known the contents thereof to C. Green, of firm of Green and Montodonico, agents for the said National Fire Insurance Company, and delivering to him a true copy of same.

A. J. McLENDON, *Sheriff,*
By G. W. BLACKWELL, *D. S.*

345 *Answer and X Bill of R. Deming & Co.*

Filed August 12th, 1891.

In the Chancery Court of Shelby County, Tennessee.

THE INSURANCE COMPANY OF NORTH AMERICA and Others
vs.
THE DELAWARE MUTUAL SAFETY INSURANCE COMPANY and Others. } 7994.

The joint and several answers of Richard Henry Deming and James Herbert Foster, trading as R. H. Deming & Co., and the Phœnix Insurance Company of New York, and the cross-bill of R. H. Deming & Co., for the use of the Phœnix Insurance Company.

The respondents, Richard Henry Deming and James Herbert Foster, for answer to the bill of complaint say that they are
346 informed that its allegations are well founded and severally admit them. They say, however, that they now have no beneficial interest whatever in this controversy, inasmuch as their corespondent, the Phœnix Insurance Company, has fully satisfied the judgment mentioned in the original bill and the said judgment is no longer of any efficacy.

The respondent, The Phœnix Insurance Company, admits that it is a corporation by the laws of the State of New York, with its principal place of business in the city of New York; that said company has an agency in the city of Memphis, or did have on the 17th of November, 1887, when the cotton mentioned and described in the bill of complain*ant* was destroyed by fire.

It also admits that of the lots of cotton so destroyed by fire,
347 5,139 bales were covered under the bills of the Cairo, Vincennes and Chicago line, which is hereafter called the Cairo line, and a specimen copy of the bill of lading appears, marked Exhibit "A," on the bill of complain*ant*.

It also admits the liability of the Cairo line for the destruction of the aforesaid cotton.

It is advised by the opinion of the supreme court in the consolidated compress cases that the special risk at the press was not covered under the fire clause in the bill of lading of the Cairo line, which was thus expressed:

That the Cairo, Vincennes & Chicago line and the following lines with which it connects and which received said property shall not be liable for leakage of oils or any other kind of liq-
348 uids, breakage of any kind of glass, earthen or queensware, carboys of acids, articles packed in glass, stoves, stove furniture, castings, machinery, carriages, furniture, musical instruments of any kinds, packages of eggs, or for rust of iron and iron articles, or for loss or damage by wet, dirt, fire, or for loss of weight, or for condition of hay, hemp, or cotton, or for loss or damage of any kind

on any article whose bulk requires it to be carried in open cars, nor for loss or damage on any article or property whatever by fires or other casulty while in transit or while waiting to be shipped at landings or ports of delivery, nor for loss or damage by fire, collision, or the dangers of navigation while on the seas, rivers, lakes, or canals.

It admits that if the cotton so covered under bills of lading of the Cairo line were the lots of Hooper & Buffington and E. H.
349 Coates and Co., for the value of which judgments were pronounced by the supreme court in favor of the owners.

It also admits that the receivers of the Cairo line and Anthony J. Thomas and Charles E. Tracey on the 17th of May, 1887, for the purpose of causing their interest in the cotton covered under the bills of lading of the Cairo line to be insured and protected — that line against any loss while cotton covered by its bills of lading was yet at the press, entered into a contract with the Merchants' Cotton Press and Storage Company, and a true copy of that contract is correctly set forth in the body of the original bill.

It admits that in part performance of the obligation imposed by the aforesaid contract the Merchants' Cotton Press & Storage Company effected in the several defendant companies and in the
350 amounts set forth fire insurance covering on the cotton in bales, while on the premises of the said company for the benefit of railroads, transportation companies, or carriers, and that the said company effected title to the three policies mentioned in said bill, numbered respectively—

11414	for	85,000
11418	"	20,000
11428	"	10,000
	In the aggregate	35,000

covered by this respondent at the time of the destruction of the aforesaid cotton, and it admits that the said insurance was primarily for the indemnity of the railroads that were in contractual relations with the Merchants' Cotton Press and Storage Company.

The respondent is advised that the entire amount of said
351 fire insurance was to be collected by the said cotton press and storage company and devoted to the liability of the Newport News & Mississippi Valley Company, the Louisville, New Orleans & Texas Railway Company, and the Cairo, Vincinnes & Chicago line, and to reimburse owners who had no other insurance.

This respondent also admits that the purpose of the Cairo line and its receivers was by the insurance so taken out through the Merchants' Cotton Press and Storage Company to provide an indemnity fund for any loss by fire while the cotton covered under the bills of lading of the Cairo line was yet in the press of the said storage company, and the object of said line and its receivers in requiring the said storage company to enter into the said con-
352 tract on the 24th of May was to impose an obligation on it to effect insurance in good and solvent companies to cover

any loss while the cotton was yet in its press, and by the said insurance to provide an indemnity that should be primary to the liability of the Cairo line; in short, to substitute the proceeds of the policies of insurance in lieu of the cotton which should be destroyed by fire in the said press.

It also admits that the policies effected and in force when the fire occurred were in the several insurance companies named as defendants and in the several amounts stated, and the name of each fire company, its residence, the amount of insurance underwritten by it are in the bill of complaint correctly stated.

353 It admits that the Merchants' Cotton Press & Storage Company after the loss by fire as aforesaid attempted to deal with the said insurance and to apply the proportion thereof collected to the use of such owners as had the dray tickets of the said storage company and no insurance of their own and to whom bills of lading had not been issued and collected $52,472.26, being 17.389 % upon the policy of each fire insurer.

This respondent says that after having paid this 17.389 % it tendered to the said storage company upon its demand for payment the exact amount claimed as due under its three aforesaid policies, with interest thereon, but that said company declined to receive that amount and execute its receipt therefor in collection of the said policies, but demanded that this respondent should

354 pay more than was claimed of it, and this it declined to do.

Afterwards, however, this respondent tendered into court, in its answer filed in the case of R. H. Deming & Co. and others against The Merchants' Cotton Press & Storage Co., the full amount it was indebted by reason of the aforesaid policies being applicable to the fire that destroyed the said cotton, and offered to pay the same to the Merchants' Cotton Press & Storage Co., and asserted that judgment might be taken against them for the full amount due.

It is advised, notwithstanding the tender by it thus made and this offer to submit to a judgment against it, the said storage company declined to take judgment against it and declined to accept the tender made of the amount due, notwitstanding it had

355 previously been declared the duty of the compress company to collect by suit, if necessary, the entire insurance, and it was by decree entered in the consolidated compress cases ordered and decreed that it was the duty of the compress Co. to collect and hold $210,249.33, that being the amount the Cairo line would be entitled to if before the court and its liability reduced to judgment, with interest thereon, and therefore this respondent submits said storage company is not entitled to have & recover of it any interest whatever after the said tender was made.

It admits that the assumption to deal, as it did, with the fire insurance companies was wrongful and rendered the said storage company liable.

It is advised that this liability was determined by the su-

356 preme court in the consolidated compress cases, and that if the amount wrongfully applied by the said storage Co. of the insurance fund that had been collected, $4,394.12, with interest

since the 17th of February, 1888, was declared to be the interest of the Cairo line thereto.

Respondent is advised by its counsel that the Merchants' Cotton Press & Storage Co. is but a trustee of this fund. Said fund is the property of the Cairo line; is within the jurisdiction of this court; its amount is ascertained and is subject to attachment.

This respondent also admits that the companies respectively granted marine policies as mentioned in their bill of complaint; that they are correctly set forth in the exhibits, and that the
357 exhibits marked "A," "B," and "C" are respectively copies of the bills of lading of the Cairo line covering cotton to which the plaintiffs' policies respectively were applicable.

Respondent admits that in addition to the three fire policies hereinbefore mentioned that it granted to the parties named the marine policies mentioned in the original bill, copies of which are marked respectively Exhibits 5, 6, 7, 8, & 9.

Respondent admits that the clause which is quoted in the opinion of the supreme court in the consolidated compress cases and called the "American clause" is correctly copied from the policy granted R. H. Deming & Co.; that R. H. Deming & Co. had destroyed in the said fire the sundry lots of cotton covered under the bills
358 of lading of the Cairo line, of which a list with the dates of each bill of lading and marks and destination of cotton are correctly stated in the bill.

The true value of each of the said lots of cotton, this respondent is advised, was established by the testimony of witnesses in case of R. H. Deming & Co. and is hereafter specified alleged.

It admits that R. H. Deming & Co. recovered against it a decree in the supreme court of Tennessee for the value of the lots of cotton mentioned in the bill of complainant, the aggregate insurance value of which was found to be the sum of $282,175.82.

This respondent says that since the recovery of the aforesaid judgment it has fully satisfied the same, all of which will appear from the records of the supreme court of Tennessee and the re-
359 ceipt of R. H. Deming & Co. to it.

Respondent also admits the granting by the several defendant marine insurance companies — the policies by each respectively to the parties named and as set forth in the bill of complainant.

It also admits that subsequent to the fire the compress Co. conveyed the lot or parcel of land described in Exhibit No. 48 for the purposes therein stated; that the rental value of the property is correctly alleged, and the rents since the date of the said instrument of conveyance (a copy of which is Exhibit No. 48) have been and are now being collected, the collections being in the hands of the defendants named as trustees in the bill of complaint and trust deed in said Exhibit No. 48.

Respondent is not advised as to which of the marine poli-
360 cies mentioned in the bill of complaint contained the American clause, except those granted by it, heretofore admitted as containing that clause, but it is informed by its counsel and be-

lieves that those that are stated as containing said clause did contain it.

Respondent admits that it has not paid anything on account of its fire policies except the amount thereon endorsed, being, as hereinbefore stated, 17.389% of the amount of each policy, and that it is indebted to the Cairo line and to the Merchants' Cotton Press & Storage Co., as the trustee of balance due upon each policy, with proper interest, the exact amount admitted to be due being the amount tendered to the said Merchants' Cotton Press & Storage Co., as has hereinbefore been stated.

361 Respondent admits the fact, alleged in the bill of complaint, of the failure of the Merchants' Cotton Press & Storage Company to perform the duty in collecting from the fire insurance companies; admits the liability of said storage company for its failure to exercise a reasonable degree of diligence to collect the insurance actually taken *and* in good & solvent insurance companies, and its liability for having failed to effect insurance fully covering the cotton for which the carriers were liable and to the extent that such uncollected insurance and deficit insurance shall be inadequate to fully indemnify the Cairo line, and through the line the owners of the cotton and the persons who are entitled to stand in court in the right of owners, for the value of cotton destroyed in the aforesaid fire.

362 And now, having fully answered, the respondents Richard Henry Deming and James Herbert Foster pray that they may be hence dismissed without costs, and the Phœnix Insurance Company joins in the prayer of the bill of complaint.

And now, by way of cross-bill, Richard Henry Deming and James Herbert Foster, trading as R. H. Deming & Co., and both residents of Providence, R. I., for the use of the Phœnix Ins. Co., a corporation by the laws of the States of New York, and the Phœnix Insurance Co., on its own behalf, bring this their cross-bill against the corporations and persons named in the original bill of complaint, both plaintiffs and defendants, and, in addition, against the Newport News & Mississippi Valley Co., a corporation by the laws of the State of Connecticut; and thereupon, by way of cross-

363 bill, they aver—

That in the fall of 1887 the defendants Anthony J. Thomas and Chas. E. Tracy were both citizens and residents of the State of New York, and were the receivers of the Wabash, St. Louis & Pacific railway, then known as the Cairo, Vincennes & Chicago line, and, as such receivers, were operating the said railway, not only between its terminal points, but were soliciting cotton shipments at Memphis, Tenn., through their general agent, L. L. Fellows.

To secure business and to conform to the uses in the city of Memphis, they entered into a contract with the Merchants' Cotton Press & Storage Company, which is set out literally in the original bill of this cause, and to which reference is now made, and which is prayed to be made a part of this cross-bill.

364 Their purpose in making the aforesaid contract was to provide a liability of the said storage company in the event of the destruction of cotton by fire in the press mentioned in the contract, and also to require the said storage company to take out policies of insurance in good and solvent companies, so as to cover their interest in the cotton covered under the Cairo line's bills of lading, and thus to provide an indemnity fund which should be in lieu of the value of the cotton which might be destroyed while yet in the press and under the control of the said storage company.

The Phœnix Insurance Co. was on the 17th day of Nov., 1887, engaged in both fire and marine insurance. Prior to that date they had granted to the parties mentioned in the original bill
365 and in this answer their several marine policies, copies of which are marked Exhibits 5, 6, 7, 8, & 9 to the original bill, prayed to be made a part of this cross-bill, but not to be copied.

When the said fire on the 17th of November, 1887, occurred the cross-plaintiffs, R. H. Deming & Co., claimed a loss as applicable to the marine policies granted them for 2,804 bales that were covered under the bills of lading of the Cairo line issued to Jones Bros. & Co., the shippers, by L. L. Fellows, the aforesaid agent of the Cairo line, and its said receivers.

These cross-plaintiffs aver that the aforesaid 2,804 bales of cotton embraced the following lots of cotton: 100 bales of cotton marked Coma, covered under bill of lading No. 62, dated the 21st of
366 October, 1887, weighing 5,017 pounds and of the market value when destroyed at Memphis, Tenn., of $9\frac{5}{16}$ — per pound; one hundred bales of cotton marked Busy, covered under bill of lading dated 21st day of October, 1887, weighing 48,542 pounds and of the market value when destroyed at Memphis of $10\frac{1}{16}$ cents per pound; 100 marked Cuni, covered under bill of lading dated 24th of October, 1887, weighing 49,380 pounds and of the market value when destroyed at Memphis of $9\frac{9}{16}$ cents per pound; 100 marked Emin, covered under bill of lading dated 28th of Oct., 1887, weighing 48,392 pounds and of the market value when destroyed of $9\frac{9}{16}$ cents per pound; 50 bales marked Dido, covered under bill of lading dated 27th of October, 1887, weighing 25,107 pounds and of the market value when destroyed of $9\frac{9}{16}$ cents per
367 pound; 100 bales marked Curl, covered under bill of lading dated November 3rd, 1887, weighing 48,836 pounds and of the market value when destroyed of $9\frac{5}{16}$ cents per pound; 102 — marked Emas, covered under bill of lading dated Nov'r 3rd, 1887, weighing 49,842 pounds and of the market value when destroyed of $9\frac{9}{16}$ cents per pound; 50 bales marked Corin, covered under bill of lading dated Nov. 4th, 1887, weighing 24,733 pounds and of the market value when destroyed of $9\frac{5}{16}$ cents per pound; 50 bales marked Eigh, covered under bill of lading dated Nov. 4th, 1887, weighing 25,021 — and of the market value when destroyed of $9\frac{9}{16}$ cents per pound; 48 bales marked Jah, covered under bill of lading dated Nov. 4th, 1887, weighing 24,533 pounds and of the market value when destroyed of $9\frac{9}{16}$ cents per pound; 100 bales marked

Bana, covered under bill of lading dated Nov. 4th,
368 1887, weighing 49,316 pounds and of the market value when destroyed of $10\frac{1}{8}$ cents per pound; 100 bales marked Cuts, covered under bill of lading dated Nov. 5th, 1887, weighing 49,048 pounds and of the market value when destroyed of $9\frac{1}{16}$ cents per pound; 100 bales marked Domx, covered under bill of lading dated Nov. 5th, 1887, weighing 49,238 pounds and of the market value when destroyed of 11 cents per pound; 25 bales marked Sima, covered under bill of lading *and* dated Nov. 7th, 1887, weighing 11,566 pounds and of the value — destroyed of $10\frac{1}{4}$ cents per pound; 100 bales marked Donn, covered under bill of lading dated November 7th, 1887, weighing 48,720 pounds and of the market value when destroyed of $9\frac{3}{4}$ cents per pound; 100 bales marked Bosm, covered under bill of lading dated Nov. 8th,
369 1887, weighing 48,000 pounds and of the value when destroyed of $10\frac{1}{8}$ cents per pound; 100 bales marked Bush, covered under bill of lading — Nov. 8th, 1887, weighing 49,294 pounds and of the market value when destroyed of $10\frac{1}{16}$ cents per pound; 100 bales marked Cows, covered under bill of lading dated Nov. 8th, 1887, weighing 49,886 pounds and of the market value when destroyed of $9\frac{15}{16}$ cents per pound; 100 bales marked East, covered under bill of lading dated Nov. 8th, 1887, weighing 49,648 pounds and of the market value when destroyed of $9\frac{9}{16}$ cents per pound; 25 bales marked C. I. V. L., covered under bill of lading dated Nov. 9th, 1887, weighing 11,853 pounds and of the market value when destroyed of $10\frac{1}{8}$ cents per pound; 125 bales marked Cabe, covered under bill of lading dated Nov. 12th, 1888, weighing 62,793 pounds and of
370 the market value when destroyed of $9\frac{15}{16}$ cents per pound; 100 bales marked Ath, covered under bill of lading dated Nov. 14th, 1887, weighing 48,291 pounds and of the market value when destroyed of $10\frac{1}{4}$ cents per pound; 100 bales marked Duex, covered under bill of lading dated Nov. 14th, 1887, weighing 51,859 pounds and of the value when destroyed of 12 cents per pound; 100 bales marked Bate, covered under bill of lading dated Nov. 14th, 1887, weighing 49,833 pounds and of the market value when destroyed of $10\frac{1}{16}$ cents per pound; 100 bales marked Bijo, covered under bill of lading dated Nov. 14th, 1887, weighing 50,370 pounds and of the market value when destroyed of $10\frac{1}{16}$ cents per pound; 100 bales marked Arts, covered under bill of lading dated Nov. 14th, 1887, weighing 51,150 pounds and of the market value when de-
371 stroyed of $10\frac{1}{4}$ cents per pound; 100 bales marked Army, covered under bill of lading dated Nov. 14th, 1887, weighing 50,793 pounds and of the market value when destroyed of $10\frac{1}{4}$ cents per pound; 100 bales marked Ages, covered under bill of lading dated Nov. 14th, 1887, weighing 50,286 pounds and of the market value when destroyed of $10\frac{1}{4}$ cents per pound; 100 bales marked Asia, covered under bill of lading dated Nov. 14th, 1887, weighing 50,904 pounds and of the market value when destroyed of $10\frac{1}{4}$ cents per pound; 100 bales marked Dubb, covered under bill of lading dated Nov. 15th, 1887, weighing 48,850 pounds and of the market value when destroyed of $9\frac{3}{4}$ cents per pound; 50 bales marked

Dash, covered under bill of lading dated Nov. 15th, 1887, weighing 25,059 pounds and of the market value when destroyed of
372 9.44¾ cents per pound; 25 bales marked Suit, covered under bill of lading dated Nov. 15th, 1887, weighing 12,118 pounds and of the market value when destroyed of 10¼ cents per pound; 100 bales marked Buzz, covered under bill of lading dated Nov. 15th, 1887, weighing 49,598 pounds and of the market value when destroyed of 10 1/16 cents per pound, the aggregate value of said cotton on the 17th of November, 1887, amounting to $137,820.74. The originals of the bills of lading these cross-complainants will produce on or before the hearing if required. They were all produced & properly identified in the consolidated Compress cases, and a true and perfect copy of each of the said bills of lading is filed as an exhibit to the original bill, and to these exhibits reference is here made and they are severally prayed to be taken as part of
373 this cross-bill, but they need not be copied for any purpose.

The cross-plaintiffs further show to the court that the Phœnix Insurance Company, as has heretofore been admitted, granted to the Hill Manufacturing Company a marine policy of insurance; that marine policy of insurance was applicable to 500 bales of cotton covered under two bills of lading granted to Ellerton D. Dorr & Co., of the Cairo line, and numbered 61 and 64 and dated 21st and 26th of October, 1887. The said 500 bales of cotton was of the value of $25,082.00.

They further show that they also granted a policy of insurance that covered 105 bales of cotton, marked Brix, to the King Philip mills, shipped on bill of lading No. 95 of the Cairo line, and when destroyed in the aforesaid fire was of the value of $5,791.88.
374 Also a policy to the Troy cotton and woolen mills that covered 100 bales of cotton of the value of $4,997.69, and a policy — the Totoket mills that covered two lots of 50 bales each, of the value of $5,416.18.

The bills of lading of the Cairo line covered all of the said lots of cotton, copies of those granted Ellerton L. Dorr & Co. being marked Exhibit*ed* "D" & "E," and those to the other consignees Exhibits 44, 45, & 46 to the original bill herein, which are now referred to, prayed to be taken as a part of this bill, but not to be copied.

These cross-plaintiffs aver that the shippers *in* the several lots of cotton assumed the fire and marine risk from Memphis to Cairo on their own behalf as shippers and for the owners and consignees, and that the aforesaid lots of cotton were all destroyed by the
375 peril of a fire while in the hands of the Merchants' Cotton Press and Storage Company, and that by reason of such destruction the Cairo line and Anthony J. Thomas and Chas. E. Tracy, the receivers of that line, are liable to Richard Henry Deming & Co., for the use of the Phœnix Insurance Company, for the aforesaid value of each of the aforesaid lots of cotton, with interest from the 17th of November, 1887.

Further complaining, these cross-complainants show to the court that a day or two before the fire the aforesaid general agent of the Cairo line and its receivers was notified by one of the officers or

employees of the said storage company or by some other duly authorized company that the shippers, Jones Bros. & Co., had
376 procured some of the lots of the cotton covered under the bills of lading of the Cairo line to be received into the press upon permits granted by W. R. McIntosh, the general agent of the defendant The Newport News & Mississippi Valley Company, and that the Merchants' Cotton Press and Storage Company and the Newport News & Mississippi Valley Co. insisted that these lots of cotton should be delivered for transportation to the mutual carrier; those agents aforesaid had permitted these lots of cotton into the press.

Being thus informed, the said L. L. Fellows, as the agent of the Cairo line and its receivers, made a contract with the Newport News & Mississippi Valley Company for the shipment of the particular marks that had been permitted into the press as aforesaid,
377 aggregating 948 bales, all of which but 150 bales are included in the cotton hereinbefore set forth. The said cotton was then, as has hereinbefore been stated, in the press that *preserved* the Newport News & Mississippi Valley Company and was known as its press. It controlled exclusively as owner the railway tracks that led to the press, and the said Fellows having made the contract for the shipment of the said 948 bales of cotton from Memphis to Cairo by the Newport News & Mississippi Valley Co., the said cotton being then at the place where the said McIntosh received cotton for transportion, delivery thereof was made, and the renting of the cotton changed from the Anchor line to the Chesapeake, Ohio & Southwestern railroad, that being one of the constitu-
378 ents of the Newport News and Mississippi Valley road, and a railroad to Cairo either via Reeves or Fulton. Accordingly, shipping directions were made out by the said Fellows and delivered to the compress company, together with dray tickets for the aforesaid 948 bales of cotton.

The agreement between the said McIntosh and the said Fellows being consummated, the shipping directions were approved by the said McIntosh, and the cotton thereupon became appropriated to the aforesaid contract.

These cross-plaintiffs further show to the court that by reason of the aforesaid contract and the appropriation of the aforesaid cotton to it the claim made & *exceeded* to, that on the delivery into
379 the press under the permit of the Newport News & Mississippi Valley Company of the said 948 bales of cotton the Newport News & Mississippi Valley Co. were liable to these cross-plaintiffs for the use of the Phœnix Insurance — of the value of the lots of cotton covered under the policies of the Phœnix Insurance Co., the marks of which are as follows: Bush, 100 bales; Bans, 50 bales; Bosm, 100 bales; Cows, 100 bales; East, 100 bales; Besx, 23 bales; Brix, 105 bales; Cixi, 25 bales; Ages, 100 bales; Aple, 100 bales.

These cross-plaintiffs further show to the court that after the declaration of the liability of the Cairo line in the consolidated com-

press cases for the loss of the said lots of cotton, the defend-
380 ant The Merchants' Cotton Press and Storage Company was requested to collect and pay over to the owners, or the persons who stood in right of owners, from the fire insurance companies the reasonable share of each, and the deficit to pay out of its own fund, so that upon the principal of the opinion of the supreme court the controversy growing out of the loss of the aforesaid cotton as well as the other cotton (the loss on which was involved in the consolidated compress cases) that was covered by the bills of lading as well of the Cairo line might be expeditiously and finally settled.

This request, which was reasonable in itself, the storage company declined to comply with, and has wholly failed to collect
381 any of the fire insurance applicable to the cotton covered under the Cairo line bills of lading, although the amount applicable to the indemnity and liability of that line is the sum of $210,249.33 yet uncollected for the defendants, the fire companies, with interest thereon from the 17th of February, 1888.

These cross-plaintiffs aver that the Cairo, Vincennes & Chicago line is justly indebted to them for the use of the Phœnix Insurance Co. for the destruction of the aforesaid 2,804 bales of cotton in the sum of $137,820.74, the value thereof, for the destruction of the aforesaid 500 bales of cotton in the sum of $25,082, the aforesaid 105 bales of cotton in the sum of $5,791.88, the 100-bale lot of the Troy woolen & cotton mills in the sum of $4,997.68, the
382 Totoket mills' 100 bales in the sum of $5,416.18, with interest thereon from the 17th of November, 1887.

They aver that the Cairo line is a corporation foreign to the State of Tennessee and the defendants, its receivers, were soliciting business in the State of Tennessee, having a general agent in the said State, who was withdrawn immediately after the aforesaid fire for the purpose of avoiding the service of process.

The cross-complainants further aver that the defendant The Merchants' Cotton Press and Storage Company is justly indebted to the Cairo line and its receivers by reason of having collected and appropriated wrongfully a reliable proportion of the said sum of $52,427.26, in the sum of $4,394.12, with interest from the
383 17th of Feb'y, 1888, and the said company has the aforesaid sum of money, with interest, in trust for the Cairo, Vincennes & Chicago line and its said receivers, who have the entire beneficial interest herein, the legal title thereof being in the said storage Co.

These cross-plaintiffs further show to the court that the several defendant fire insurance companies are indebted to the Cairo line and its receivers in an amount equal to the balance due on its respective fire policies less the amount paid over to the Merchants' Cotton Press and Storage Co. and to be paid in exoneration of other carriers' liability upon the principals of the decree of the supreme court in the said consolidated compress cases; and these cross-
384 plaintiffs further show to the court and aver that the Cairo line and its said receivers have an interest in the particular parcel of land conveyed under the trust deed mentioned and de-

scribed in the original bill, a true copy of which is marked Exhibit No. 48 to the said bill, and for particular description of which reference is here made to the said Exhibit No. 48, which is also prayed to be taken as a part of this cross-bill, but it need not be copied.

The cross-plaintiffs further aver that there no longer exists a ground of controversy between them and the Cairo line and its said receivers, because the said line has been declared liable for the loss of the aforesaid lots of cotton, and the receivers by effecting
385 through the Merchant's Cotton Press & Storage Co. insurance equal to over 85½ % of the value of the cotton, and providing by the contract the legal obligation of the said storage company to take out in good and solvent insurance companies to the full value of the aforesaid cotton, so as to cover their interest therein and any loss thereof, and, having the interest in the said lot or parcel of land and the aforesaid obligation of the compress company, they provided firm and contractual obligations primary to the liability of the Cairo line and its receivers against any loss and sufficient in amount and value to supply the place of said lots of cotton for which the said lien and its said receivers are liable.

These cross-plaintiffs further show to the court that the
386 Newport News & Miss. Valley Co. held a contract of a like tenor and effect to the contract set forth in the original bill between the Cairo, Vincennes & Chicago line and the Merchants' Cotton Press & Storage Co., and that in the opinion handed down in the consolidated compress cases and the decree entered in conformity therewith it was ruled that the compress company was liable to the carrier having these contractual *regulations* with it for the breach of its obligation to fully cover, by effecting insurance in good and solvent companies, the value of the property destroyed, for which the carrier was liable to the extent of such deficit of insurance; so they are advised that for the deficit between the amount which would adequately indemnify the holder of
387 the bills of lading of the Cairo line and the Cairo line for the loss of the lots of cotton covered under the said bills of lading the Cotton Press & Storage Co. is justly indebted to the said Cairo line.

The cross-plaintiffs are informed and believe and upon information they allege the Merchants' Cotton Press and Storage Company are requested by the Cairo, Vincennes & Chicago line, through its duly accredited representatives, to collect and pay over the insurance applicable to the lots of cotton covered under the bills of lading of the said line, and to pay any deficit out of its own funds; and yet, notwithstanding such request, it refuses to made such collection and pay over to the parties entitled thereto the insur-
388 ance provided as an indemnity to the Cairo line, and has wholly failed to collect or to make any *bona fide* attempt to collect any part of the insurance which the supreme court imposed a trust upon for the benefit of the Cairo line, but has from the very inception of this controver-y made common cause with its fire insurers and placed every obstacle in the way of the collection of the said insurance which it could place without its being made to ap-

pear that it was really putting obstacles in the way of the performance of its duty repeatedly declared by the court and the supreme court of Tennessee.

These cross-plaintiffs are advised that they are entitled to come into this court to reach the interest of the Cairo, Vincennes
389 & Chicago line and its receivers in the policy of insurance effected. In the fund hereinbefore stated to be in the hands of the Merchants' Cotton Press & Storage Co. as trustees, and in the lot or parcel of land hereinbefore set forth, and to enforce as well the liability of the Newport News & Mississippi Valley Co. for the loss of the aforesaid 798 bales of cotton.

Wherefore these cross-plaintiffs pray that copy and subpœna may issue from this court as to the defendant The Newport News & Mississippi Company and they be required to answer the allegations of this bill, under its corporate seal, by the next rule day of this court.

That the parties named as defendants to this cross-bill *and* required to answer its allegations, the corporate persons under
390 the seal of the corporations, the individual persons not under oath, their oaths being waived; that an attachment issue and be levied on the interest of the Cairo, Vincennes & Chicago line and Anthony J. Thomas and Chas. E. Tracy in the lot or parcel of land described in Exhibit No. 48; that the said funds in the hands of the Merchants' Cotton Press and Storage Company be impounded and the said defendant fire insurance companies be required to answer as garnishees as well as otherwise, and that upon final hearing of this cause a decree be rendered against the Newport News and Mississippi Valley Company for the value of 798 bales of cotton, with interest, and against the Cairo line for the value of the hereinbefore-mentioned lots of cotton,
391 with interest thereon, and your honor will subject to the payment of the said recoveries the relative proportion of the same held in trust for the Cairo line by the Merchants' Cotton Press & Storage Company, and any indebtedness which may be due from the Merchants' Cotton Press & Storage Company for the breach of its obligation to the said company or its receivers the amount due from the several fire insurance companies named as defendants will apply, and also apply the funds which may appear in the hands of trustees, Napoleon Hill, T. H. Allen, Jr., growing out of the lease of the land described in Exhibit = 48, and subject the lot or parcel of land to a sale and apply the proceeds, if necessary and requisite, in exoneration of the liability of the carriers and pronounce between these
392 cross-plaintiffs and the defendant fire insurance companies and the defendant marine insurance companies whose policies covered the cotton under the bills of lading of the Kanawha Despatch, and the cotton-owners who held dray tickets, that the right of contribution does not exist between, and adjusts that there is no fund for contribution, and thereby eschew each and every one of them from participating in the fire insurance effected by the Merchants' Cotton Press & Storage Company, and grant to these cross-plaintiffs a writ of attachment to be levied on the interest of

the C., V. & C.'s line in the aforesaid lot and the aforesaid fund, and by garnishing the compress company and defendant fire insurance companies and grant them this cross-bill of relief which may be suitable in the premises, whether the same be general or special, to the end that this controversy may be ended and settled.

393 This is the first application for a writ of attachment on this cross-bill.

TAYLOR AND CARROLL,
Sol's for Defendants and Cross-plaintiffs.

I am security for costs.

WM. CARROLL.

[CORPORATE SEAL.] PHŒNIX INSURANCE CO.,
By GEO. P. SHELDON, *Pres't.*

STATE OF TENNESSEE, }
County of Shelby. }

Personally appeared before E. B. McHenry, clerk and master of the chancery court of Shelby county, J. A. Taylor, attorney for complainant, who made oath in due form of law that the statements made in the foregoing cross-bill are true to the best of
394 & 395 his knowledge, information, and belief.

JULIUS A. TAYLOR.

Sworn to and subscribed before me this 12th day of August, 1891.

E. H. McHENRY,
Clerk and Master.

The clerk and master of the chancery court of Shelby county, Tennessee, will issue the writs as prayed for in the bill upon complainants giving bond and security in the penalty of $10,000.00, conditioned as provided by law.

Given under my hand this Aug. 12th, 1891.

J. S. GALLOWAY, *Judge.*

A copy.
Attest: M. L. VESEY,
D. C. & M.

396 *Attachment on Cross-bill of Deming & Co., Issued 12th Day of*
397 *August*, 1891.

Whereas R. H. Deming & Co., for use, &c., filed their cross-bill in the chancery court of Shelby county against the Cairo, Vincennes & Chicago line *et al.* and obtained from Hon. J. S. Galloway, judge, an order for the issuance of an attachment against the estate of the said Cairo, Vincennes & Chicago line, A. J. Thomas and C. E. Tracy, receivers, and bond having been given as required by law in attachment cases: You are therefore commanded to attach so much of the estate of the said C., V. & C. line *et al.* as will satisfy the claim of complainant, which is alleged in the bill to be

$179.108.48, together with the costs of this cause, and you are especially commanded to attach the following-described property, to wit., any found in the hands of the Merchants' Cotton Press
398 & Storage Company belonging to said C., V. & C. line or Thomas & Tracy, receivers, and also any interest of the said C., V. & C. line and Thomas & Tracy, receivers, in a lot known as the Senatobia-street shed, and also in the rents of the said lot in the hands of Napoleon Hill, L. R. Montgomery, T. H. Allen, Jr., trustees.

And also by garnishment on the various fire insurance companies, a full list of which accompanies the original attachment in this cause, and such estate, unless replevied, so to secure that the same may be liable to further proceedings thereon, to be had at the said court to be held for the county of Shelby on the first Monday in September next, at the court-house, in the city of Memphis, when and where you will make known how you have executed this writ.

399 Witness E. B. McHenry, clerk and master of our said court, at office, in the city of Memphis, the first Monday in April, 1891.

E. B. McHENRY,
Clerk and Master.

Return of Sheriff.

Came to hand Aug. 12th, 1891, and executed Aug. 14th, 1891, by levying this attachment by garnishment upon the Phœnix Insurance Company, the Merchants' Cotton Press and Storage Company, the Royal Insurance Company, the Ætna Fire & Marine Insurance Company, the Continental Insurance Company, the Home Insurance Company of La., the Fire Association, the German-American Insurance Company, the Liverpool, London & Globe Insurance Company, the Mississippi Home Insurance Company, and the National Fire Insurance Company; also on Thomas Allen, Jr., tr., Aug. 20th, 1891. N. Hill, L. R. Montgomery are not to be found in my county.

400 Copies of said garnishment are herewith filed & referred to as a part of this return.

The remaining insurance companies herein referred to are not to be found in my county.

Aug. 31, 1891.

A. J. McLENDON, *Sheriff.*
By G. W. BLACKWELL, *D. S.*

STATE OF TENNESSEE, }
Shelby County. }

In the Chancery Court of Shelby County, Tenn.

INS. CO. OF N. A. & *al.* }
versus
DEL. MUT. S. A. CO. }

Garnishment Executed by Virtue of an Attachment Issued from said Court, Returnable to the April Term, 1891.

To the Phœnix Insurance Company:

You are hereby summoned to be and to personally appear before the judge of the chancery court of Shelby Co., Tenn., at a
401 term of said court to be held at the court-house, in Memphis, on the 1st Monday in September, 1891, and then and there to answer as garnishee in the above-entitled case, on oath, such questions as may be asked you in relation to money, property, or effects of defendant C., V. & C. Line, A. J. Thomas and C. Tracy, receivers, in the above-stated case.

And I hereby notify you that all the property, money, goods, and effects of said defendant now in your custody or possession has been attached or levied on to satisfy an attachment issued in said cause in favor of the plaintiff and against the above-named defendant.

And I also notify you not to pay to said defendant any debt now due or hereafter to become due, but to retain possession of the same and all property and effects of the said defendant which are now or may hereafter come under your control or into your posses-
402 sion until you have made full answer to this garnishment or been fully discharged by order of the said court.

Done at my office, in Memphis, Tenn., on this 14th day of August, 1891.

A. J. McLENDON,
Sheriff of Shelby County,
By G. W. BLACKWELL,
Deputy Sheriff.

Return of Sheriff.

Executed the within garnishment on the Phœnix Insurance Company, 14th day of August, 1891, by making known the contents thereof to C. Green, of firm of Green & Montodonico, agents of the said Phœnix Insurance Company, and delivering to him a true copy of same.

A. J. McLENDON, *Sheriff,*
By G. W. BLACKWELL, *D. S.*

STATE OF TENNESSEE, }
Shelby County. }

403 In the Chancery Court of Shelby Co., Tenn.

INS. CO. OF N. A. & *al.* }
versus
DEL. MUT. S. A. CO. & *al.* }

Garnishment Executed by Virtue of an Attachment Issued from said Court, Returnable to the April Term, 1891.

To the Merchants' Cotton Press & Storage Company:

You are hereby summoned to be and personally appear before the judge of the chancery court of Shelby county, Tenn., at a term of said court to be held at the court-house, in Memphis, on the 1st Monday in Sept., 1891, and then — there to answer as garnishee in the above case, on oath, such questions as may be asked you in relation to money, property, or effects of defendant C., V. & C. Line or A. J. Thomas & C. E. Tracy, receivers, in the above-stated case;
404 and I hereby notify you that all the property, money, goods, and effects of said defendant now in your custody or possession *has* been attached or levied on to satisfy an attachment issued in said cause in favor of the plaintiff and against the above-named defendant.

And I also notify you not to pay to said defendant any debt now due or hereafter to become due, but to retain possession of the same and all property and effects of the said defendant which are now or may hereafter come under your control or into your possession until you have made full answer to this garnishment or been fully discharged by order of the said court.

Done at my office, in Memphis, Tenn., this 13th day of August, 1891.

A. J. McLENDON,
Sheriff of Shelby Co.,
By G. W. BLACKWELL,
Deputy Sheriff.

405 *Return of Sheriff.*

Executed the within garnishment on the Merchants' Cotton Press and Storage Company, 14th day of August, 1891, by making known the contents thereof to J. M. Foulkes, sec. & treas., and delivering to him a true copy of same.

A. J. McLENDON, *Sheriff.*
G. W. BLACKWELL, *D. S.*

STATE OF TENNESSEE, }
County of Shelby. }

In the Chancery Court of Shelby Co., Tennessee.

INS. CO. OF N. A. & *al.* }
versus
DEL. M. L. INS. CO. & *al.* }

Garnishment Executed by Virtue of an Attachment Issued by said Court, Returnable to the April Term, 1891.

To the Royal Insurance Company:

406 You are hereby summoned to be and personally appear before the judge of the chancery court of Shelby county, Tenn., at a term of said court to be held at the court-house, in Memphis, on the first Monday in September, 1891, and then — there to answer as garnishee in the above-entitled case, on oath, such questions as may be asked you in relation to money, property, or effects of defendant C., V. & C. Line, A. J. Thomas and C. E. Tracy, receivers, in the above-stated case.

And I hereby notify you that all the property, money, goods, and effects of said defendant now in your custody or possession *has* been attached or levied on to satisfy an attachment issued in such cause in favor of the plaintiff and against the above-named defendant.

407 And I also notify you not to pay to said defendant any debt now due or hereafter to become due, but to retain possession of the same and all property and effects of the said defendant which are now or may hereafter come under your control or into your possession until you have made full answer to this garnishment or been fully discharged by order of the said court.

Done at my office, in Memphis, Tenn., this 14th day of August, 1891.

A. J. McLENDON,
Sheriff of Shelby County,
By G. W. BLACKWELL,
Deputy Sheriff.

Return of Sheriff.

Executed the within garnishment of the Royal Insurance Company 14th day of August, 1891, by making known the contents thereof to C. Green, of firm of Green & Montodonico, agents for the above-named Royal Insurance Co., and delivered to him a true copy of same.

A. J. McLENDON, *Sheriff,*
408 By G. W. BLACKWELL,
Deputy Sheriff.

STATE OF TENNESSEE, }
Shelby County. }

In the Chancery Court of Shelby County, Tenn.

INS. CO. OF N. A. & *al.* }
versus
DEL. M. S. INS. CO. & *al.* }

Garnishment Executed by Virtue of an Attachment Issued from said Court, Returnable to the April Term, 1891.

To the Ætna Fire and Marine Insurance Co.:

You are hereby summoned to be and personally appear before the judge of the chancery court of Shelby county, Tenn., at a term of said court to be held at the court-house, in Memphis, on the first Monday in September, 1891, and then — there to answer, as garnishees in the above-entitled case, on oath such questions as may be asked you in relation to money, property, or effects of de-
409 fendant C., V. & C. Line, A. J. Thomas and C. E. Tracy, receivers, in the above-stated case.

And I hereby notify you that all the property, money, goods, and effects of said defendant now in your custody or possession *has* been attached or levied on to satisfy an attachment issued in said cause in favor of the plaintiff and against the above-named defendant.

And I also notify you not to pay to said defendant any debt now due or hereafter to become due, but to retain possession of the same and all property and effects of said defendant which are now or may hereafter come under your control or into your possession until you have made full answer to this garnishment or been fully discharged by order of the said court.

Done at my office, in Memphis, Tenn., this 14th day of August, 1891.

410 A. J. McLENDON,
Sheriff of Shelby Co.,
By G. W. BLACKWELL,
Deputy Sheriff.

Return of Sheriff.

Executed the within garnishment on the Ætna Fire and Marine Insurance Company 14th day of August, 1891, by making known the contents thereof to C. Mason, of firm of Carrington, Mason & Sons, agents for the said Ætna Fire & Marine Insurance Company, and delivering to him a true copy of same.

A. J. McLENDON, *Sheriff*,
By G. W. BLACKWELL, *D. S.*

STATE OF TENNESSEE, }
County of Shelby. }

In the Chancery Court of Shelby County, Tennessee.

Garnishment Executed by Virtue of an Attachment Issued from said Court, Returnable to the April Term, 1891.

411 To the Continental Insurance Company:

You are hereby summoned to be and to personally appear before the judge of the chancery court of Shelby county, Tenn., at a term of the said court to be held at the court-house, in Memphis, on the first Monday in September, 1891, and then — there to answer, as garnishee in the above-entitled case, on oath such questions as may be asked you in relation to money, property, or effects of defendant C., V. & C. Line, A. J. Thomas and C. E. Tracy, receivers, in the above stated case; and I hereby notify you that all of the property, money, goods, and effects of said defendant now in your custody or possession *has* been attached or levied on to satisfy an attachment issued in said cause in favor of the plaintiff and against the above-named defendant.

412 And I also notify you not to pay to said defendant any debt now due or hereafter to become due, but to retain possession of the same and all property and effects of the said defendant which are now or may hereafter come under your control or into your possession until you have made full answer to this garnishment or been fully discharged by order of the said court.

Done at my office, in Memphis, Tenn., this 14th day of August, 1891.

A. J. McLENDON,
Sheriff of Shelby Co.,
By G. W. BLACKWELL, *D. S.*

Sheriff's Return.

Executed the within garnishment of the Continental Insurance Company 14th day of August, 1891, by making known the contents thereof to Colton Green, of the firm of Green and
413 Montodonico, agents for the Continental Insurance Company, and delivering to him a true copy of same.

A. J. McLENDON, *Sheriff*,
By G. W. BLACKWELL, *D. S.*

STATE OF TENNESSEE, }
County of Shelby. }

In the Chancery Court of Shelby County, Tennessee.

INS. CO. OF N. A. & *al.* }
versus
DEL. M. S. A. CO. & *al.* }

Garnishment Issued by Virtue of an Attachment Issued from said Court, Returnable to the April Term, 1891.

To the Fire Association:

You are hereby summoned to be and to personally appear before the judge of the chancery court of Shelby county, Tenn., at a
414 term of said court to be held at the court-house, in Memphis, on the first Monday in September, 1891, and then — there to answer, as garnishee in the above-entitled case, on oath such questions as may be asked of you in relation to money, property, or effects of defendant C., V. & C. Line; A. J. Thomas, C. E. Tracy, receiver-, in the above-stated case; and I hereby notify you that all property, money, goods, & effects of said defendant now in your custody or possession *has* been attached or levied on to satisfy an attachment issued in said cause in favor of the plaintiff and against the above-named defendant.

And I also notify you not to pay to said defendant any debt now due or hereafter to become due, but to retain possession of the same and all property and effects of the said defendant which are
415 now or may hereafter come under your control or into your possession until you have made full answer to this garnishment or been fully discharged by order of the said court.

Done at my office, in Memphis, Tenn., this 14th day of August, 1891.

A. J. McLENDON,
Sheriff of Shelby Co.,
By G. W. BLACKWELL,
Deputy Sheriff.

Return of Sheriff.

Executed the within garnishment on the fire association on the 14th day of August, 1891, by making known the contents thereof to C. E. Murphy, of firm of Murphy & Murphy, agents for said fire association, and delivering to him a true copy of same.

A. J. McLENDON, *Sheriff*,
B- G. W. BLACKWELL, *D. S.*

416 STATE OF TENNESSEE, }
County of Shelby. }

In the Chancery Court of Shelby County, Tennessee.

Garnishment Executed by Virtue of an Attachment Issued from said Court, Returnable to the April Term, 1891.

To the German-American Insurance Company:

You are hereby summoned to be and personally appear before the judge of the chancery court of Shelby county, Tenn., at a term of said court to be held at the court-house, in Memphis, on the first Monday in September, 1891, and then — there to answer, a-garnishee in the above-entitled case, on oath such questions as may be asked you in relation to money, property, or affects of defendant C., V. & C. Line,
417 A. J. Thomas & C. E. Tracy, receivers, in the above-stated case; and I hereby notify you that all the property, money, goods, or effects of said defendant now in your custody or possession *has* been attached or levied on to satisfy an attachment issued in said cause in favor of the plaintiff and against the above-named defendant.

And I also notify you not to pay to said defendant any debt now due or hereafter to become due, but to retain possession of the same and all property & effects of the said defendant which are now or may hereafter come under your control or into your possession until you have made full answer to this garnishment or been fully discharged by order of the said court.

Done at my office, in Memphis, Tenn., this 14th day of August, 1891.

418 A. J. McLENDON,
Sheriff of Shelby County,
By G. W. BLACKWELL, *Deputy S.*

Return of Sheriff.

Executed the within garnishment on the German-American Insurance Co. 14th day of August, 1891, by making known the contents thereof to Thomas Wellford, agent for the said German-American Ins. Co., and delivering to him a true copy of same.

A. J. McLENDON, *Sheriff,*
By G. W. BLACKWELL, *D. S.*

STATE OF TENNESSEE, }
County of Shelby. }

In the Chancery Court of Shelby County, Tennessee.

Garnishment Executed by Virtue of an Attachment Issued from said Court, Returnable to the April Term, 1891.

To the Home Insurance Company:

419 You are hereby summoned to be and personally appear before the judge of the chancery court of Shelby county,

Tenn., at a term of said court to be held at the court-house, in Memphis, on the first Monday in September, 1891, and then — there to answer, as garnishee in the above-entitled case, on oath such questions as may be asked you in relation to money, property, or effects of defendants C., V. & C. Line, A. J. Thomas & C. E. Tracey, receivers, in the above-stated case.

And I hereby notify you that all the property, money, goods, & effects of said defendant now in your custody or possession *has* been attached or levied on to satisfy an attachment issued in said cause in favor of the plaintiff and against the above-named defendant.

And I also notify you not to pay to said defendant any
420 debt now due or hereafter to become due, but to retain possession of the same and all property and effects of the said defendant which are now or may hereafter come under your control or into your possession until you have made full answer to this garnishment or been fully discharged by order of the said court.

Done at my office, in Memphis, Tenn., this 14th day of August, 1891.

A. J. McLENDON,
Sheriff of Shelby Co.,
By G. W. BLACKWELL, *Deputy S.*

Return of Sheriff.

Executed the within garnishment on the Home Insurance Company 14th day of Aug., 1891, by making known the contents thereof to T. R. Farnsworth, of the firm of Warren & Farnsworth, agents for the said Home Insurance Co., and delivering to them a true copy of same.

A. J. McLENDON, *Sheriff*,
421 By G. W. BLACKWELL,
Deputy Sheriff.

STATE OF TENNESSEE, }
County of Shelby. }

In the Chancery Court of Shelby County, Tennessee.

Garnishment Executed by Virtue of an Attachment Issued from said Court, Returnable to the April Term, 1891.

To the Liverpool, London & Globe Insurance Co.:

You are hereby summoned to be and personally appear before the judge of the chancery court of Shelby county, Tennessee, at a term of said court to be held at the court-house, in Memphis, on the first Monday in September, 1891, and then — there to answer, as garnishees in the above-entitled case, on oath such questions as
422 may be asked you in relation to money, property, or effects of defendant C., V. & C. Line, A. J. Thomas C. E. Tracy, receivers, in the above-stated case.

And I hereby notify you that all the property, money, goods, & effects of said defendants now in your custody or possession *has* been attached or levied on to satisfy an attachment issued in said cause in favor of the plaintiff and against the above-named defendant.

And I also notify you not to pay to said defendant any debt now due or hereafter to become due, but to retain possession of same and all property and effects of the said defendant which are now or may hereafter come under your control or into your possession until you have made full answer to this garnishment or been
423 fully discharged by order of the said court.

Done at my office, in Memphis, Tenn., this 14th day of August, 1891.

A. J. McLENDON,
Sheriff of Shelby Co.,
By G. W. BLACKWELL,
Deputy Sheriff.

Return of Sheriff.

Executed the within garnishment on the Liverpool, London & Globe Ins. Co. 14th day of Aug., 1891, by making known the contents thereof to C. Green, of firm of Green & Montodonico, agents for said Liverpool, London & Globe Ins. Co., and delivering to him a true copy of same.

A. J. McLENDON, *Sheriff*,
By G. W. BLACKWELL, *D. S.*

STATE OF TENNESSEE, }
Shelby County. }

In the Chancery Court of Shelby County, Tennessee.

424 *Garnishment Executed by Virtue of an Attachment Issued from said Court, Returnable to the April Term*, 1891.

To the Mississippi Home Insurance Co.:

You are hereby summoned to be and personally appear before the judge of the chancery court of Shelby county, Tenn., at a term of said court to be held at the court-house, in Memphis, on the first Monday in September, 1891, and then — there to answer, as garnishee in the above-entitled case, on oath such questions as may be asked you in relation to money, property, or effects of defendant C., V. & C. Line, A. J. Thomas & C. E. Tracy, receivers, in the above-stated case.

And I hereby notify you that all the property, money, goods, & effects of said defendant now in your custody or possession
425 *has* been attached or levied on to satisfy an attachment issued in said cause in favor of the plaintiff and against the above-named defendant.

And I also notify you not to pay to said defendant any debt now due or hereafter to become due, but to retain possession of same and all property and effects of the said defendant which are now or may

hereafter come under your control or into your possession until you have made full answer to this garnishment or been fully discharged by order of the said court.

Done at my office, in Memphis, Tenn., this 14th day of August, 1891.

A. J. McLENDON,
Sheriff of Shelby Co.,
By G. W. BLACKWELL,
Deputy Sheriff.

Return of Sheriff.

Executed the within garnishment on the Miss. Home Ins.
426 Co. 14th day of August, 1891, by making known the contents thereof to W. L. Parker, agent for said Mississippi Home Ins. Co., and delivering to him a true copy of same.

A. J. McLENDON, *Sheriff*,
By G. W. BLACKWELL, *Deputy S.*

STATE OF TENNESSEE, }
Shelby Co. }

In the Chancery Court of Shelby Co., Tennessee.

Garnishment Executed by Virtue of an Attachment Issued from said Court, Returnable to the April Term, 1891.

To the National Fire Insurance Company:

You are hereby summoned to be and personally appear before the judge of the chancery court of Shelby county, Tenn., at a term of said court to be held at the court-house, in Memphis,
427 Tenn., on the first Monday in September, 1891, and then — there to answer, as garnishee in the above-entitled case, on oath such questions as may be asked you in relation to money, property, or effects of defendant C., V. & C. Line, A. J. Thomas, C. E. Tracy, receivers, in the above-stated case.

And I hereby notify you that all the property, money, goods, and effects of said defendant now in your custody or possession *has* been levied on to satisfy an attachment issued in said cause in favor of the plaintiff and against the above-named defendant.

And I also notify you not to pay to said defendant any debt now due or hereafter to become due, but to retain possession of the same and all property and effects of the said defendant which are now or may hereafter come under your control or into your posses-
428 sion until you have made full answer to this garnishment or been fully discharged by order of the said court.

Done at my office, in Memphis, Tenn., this 14th day of August, 1891.

A. J. McLENDON,
Sheriff of Shelby Co.,
By G. W. BLACKWELL,
Deputy Sheriff.

Return of Sheriff.

Executed the within garnishment on the National Fire Insurance Company on 14th day of August, 1891, by making known the contents thereof to C. Green, of the firm of Green & Montodonico, agents of said National Fire Insurance Company, and delivering to him a true copy of same.

A. J. McLENDON, *Sheriff*,
By G. W. BLACKWELL, *D. S.*

STATE OF TENNESSEE, }
Shelby County. }

In the Chancery Court of Shelby Co., Tenn.

429 *Garnishment Executed by Virtue of an Attachment Issued from said Court, Returnable to the April Term*, 1891.

INS. CO. OF N. A. & *al.* }
versus
DEL. MUT. S. A. CO. & *al.* }

To Napoleon Hill, S. R. Montgomery, and T. H. Allen, Jr., trustees:

You are hereby summoned to be personally and appear before the judge of the chancery court of Shelby county, Tenn., at a term of said court to be held at the court-house, in Memphis, on the first Monday in September, 1891, and then — there to answer as garnishee in the above-entitled case, on oath, such questions as may be asked you in relation to money, property, or effects of defendant C., V. &
C. Line, A. J. Thomas & Chas. E. Tracy, receivers, in the
430 above-stated cases.

And I hereby notify you that all property, money, goods, and effects of said defendant now in your custody or possession *has* been attached or levied on to satisfy an attachment issued in said cause in favor of the plaintiff and against the above-named defendant.

And I also notify you not to pay over to said defendant any debt now due or hereafter to become due, but to retain possession of the same and all property and effects of the said defendant which are now or may hereafter come under your control or into your possession until you have made full answer to this garnishment or been fully discharged by order of the said court.

A. J. McLENDON,
Sheriff of Shelby County,
By G. W. BLACKWELL,
Deputy Sheriff.

431–449 *Return of Sheriff.*

Executed the within garnishment on the 20th day of August, 1891, by making known the contents thereof to T. H. Allen, Jr., tr., and delivering to him a true copy of same.

A. J. McLENDON, *Sheriff*,
By G. W. BLACKWELL, *D. S.*

Amended Original Cross-bill, &c. Filed Sept. 22, '91.

STATE OF TENNESSEE, *Shelby Co.*

In the Chancery Court of Shelby Co., Tenn.

450 THE INSURANCE COMPANY OF NORTH AMERICA of Philadelphia and Others. *versus* THE DELAWARE MUTUAL SAFETY ASSURANCE COMPANY & Others. } Original Bill.

RICHARD HENRY DEMING and JAMES HERBERT FOSTER, Partners under the Firm Name of R. H. Deming & Co., for the Use of the Phœnix Insurance Co., and the Phœnix Insurance Co. on its Own Behalf *versus* THE DELAWARE MUTUAL SAFETY ASSURANCE COMPANY & Others.

THE C., V. & C. LINE and ANTHONY J. THOMAS and Chas. E. Tracy, Receivers thereof, and the Delaware Mutual Safety Assurance Company *versus* THE INSURANCE CO. OF NORTH AMERICA & Others. } Cross-Bill.

451 *Amended Bill and Amended Cross-bills of Complainant. Filed Sept. 22nd, 1891.*

To the honorable chancellor of the chancery court of Shelby county, Tennessee:

Showeth your orators *under* your honor that on the 7th day of August last they exhibited in this honorable court their original bill of complaint against, among others, the Cairo, Vincennes and Chicago line, which they alleged to be a corporation by the laws of the State of Illinois, as well as against Anthony J. Thomas and Chas. E. Tracy, the receivers thereof. The said original bill of complaint is in the words and figures following, to wit:

Said original bill, being set out in full in this transcript, is not here copied again.

452 And showeth *to* your orators, Richard Henry Deming and James Herbert Foster, partners as R. H. Deming & Co., and the Phœnix Insurance Company, that they filed on the 12th day of August last past their answer to the said original bill and their cross-bill and in their said answer admitted and in their said cross-bill averred that the Cairo, Vincennes & Chicago line was a corporation by the laws of the State of Illinois.

The said cross-bill, except in so far as they seek to correct the above admission and averment, they reiterate and repeat.

And showeth unto your honor the cross-plaintiff, The Delaware

Mutual Safety Assurance Company, now called the Delaware Insurance Company, that it failed in the name of the C., V. & C. line, and Anthony J. Thomas and Chas. E. Tracy, its receivers, for its use, its cross-bill of complainant herein, and alleged therein certain
453 matters and things which are reiterated and repeated. It further says that in its answer it admitted the C., V. & C. line was a corporation by the laws of Illinois. That admission was at that time believed to be well founded and true, but it was subsequently ascertained that the C., V. & C. line was a name designated as a mere trade-mark in order that Anthony J. Thomas and Chas. E. Tracy, receivers of the Cairo division of the Wabash, St. Louis and Pacific Railway Co., might keep the trusts of their receiverships of such division separate and apart from the trusts and receiverships of the other properties of the Wabash, St. Louis & Pacific R'y Co., and the said cross-plaintiff joins herein to correct the allegation in its said manner and cross-bill and to obtain suitable relief as to the matters and things set out in the original bill of complaint and in its said cross-bill.

454 And showeth farther your orators, Richard Henry Deming and James Henry Foster and the Phœnix Insurance Company, that, *inter alias*, they allege a short time before the fire of the 17th of November, 1887, the C., V. & C. line and its receivers were notified by the notification of L. L. Fellows, their general agent, that sundry lots of cotton, aggregating 948 bales, had been permitted into the Press upon the permits of W. R. McIntosh, the general freight agent of the N. N. & M. C. Co., granted to Jones Bros. & Co. as to these lots of cotton; insisted that they should be transported from Memphis to Cairo by the said C., O. & S. W. R'y, one of the constituent's Co.'s, and that upon the contention aforesaid L. L. Fellows, the agent of the C., V. & C. line, and its receivers made a contract with the aforesaid agent, the N. N. & M. V.
455 Co., for the shipment of the said lots of cotton by the said C., O. & S. W. R'y Co., and the said lots of cotton were accordingly delivered and accepted for transportation and were when destroyed in possession of the N. N. & M. V. Co., & they showeth also in possession of C., O. & S. W. R'y Co. by way of amendment.

And showeth your orator, The Insurance Company of North America of Philadelphia, by way of amendment to the original bill herein filed, that of the said lots of cotton, aggregating 948 bales of cotton, marked made, shipped for account of the Shove mills, and it at the date of its destruction was of the value of $6,791.58.

And showeth your orators, by way of further amendment, that since the allegations in their bill of complaint and cross-bills were made they have upon further inquiry ascertained that they
456 were mistaken in the allegation that the C., V. & C. line was a corporation by the laws of the State of Illinois.

They were thus informed and by common consent it was assumed to be a fact in the litigations involving the destruction of the cotton in the compress fire of November 17th, 1887.

As to the said allegation, however, they have subsequently as-

certained that they are in error, and beg leave to withdraw the same.

And showeth further your orators, by way of amendment, that on the 15th of Oct., 1884, the defendants Anthony J. Thomas and Chas. E. Tracy were and have since that time continuously been and are now citizens of the State of New York. They were appointed & substituted as trustees in the Cairo division mort-
457 gage of the Wabash, St. Louis and Pacific R'y, formed by various consolidations a corporation of the several States of Missouri, Illinois, Indiana, and Ohio.

The Cairo division was one of the many lines owned and operated by the said consolidated company. It commenced at Cairo, in the State of Illinois, extended to Fulton, in the State of Illinois, with a branch from St. Francis, in Illinois, to Vincennes, in the State of Indiana.

On the 4th day of April, 1885, the aforementioned Thomas & Tracy as substituted trustees of the Mercantile Trust Company of New York in the Cairo division mortgage of the said Wabash, St. Louis & Pacific R'y Co., filed in the circuit court of the United States for the southern district of Illinois their bill in equity for
458 the foreclosure of the said division mortgage. Afterward they were appointed the receivers of the Cairo division of the Wabash, St. Louis & Pacific R'y Co by order & decree of the circuit court aforesaid, and from the time of their appointment up to and including the said 17th day of November, 1887, they were operating the said Cairo division, soliciting cotton shipments at Memphis, Tennessee, as has been alleged in the bill.

And showeth your orators and cross-complainants therefore that the C., V. & C. line was not a corporation under & by the laws of the State of Illinois or a corporation at all.

The original corporation was known as the Cairo & Vincennes road, and was consolidated into and became a part of the Wabash, St. Louis & Pacific R'y, and from that time afterwards was known as the Cairo division of the Wabash, St. Louis and Pacific
459 R'y Co.

And showeth your orators and cross-complainants that the receivers aforesaid, in order to aggregate from the other property of the said Wabash, St. Louis & Pacific R'y Co. and to administer the trusts of the receivership of the Cairo division intelligently, adopted the name of the Cairo, Vincennes & Chicago line as a mere trade-mark.

And showeth your orators and cross-complainants, by way of further amendment, that after the contract made between the defendants Thomas & Tracy and the N. N. & M. V. Company for the shipment of the aforementioned 948 bales of cotton, being the 150 bales marked made and the 798 bales the marks of which are set forth in the cross-bill of R. H. Deming & Co., all custody & control of
460 them was turned over & surrendered by the receiver through their agent of the N. N. & M. V. Company and by his directions shipping directions were made out for the aforesaid 948 bales of cotton, and they were delivered to the Merchants' Cotton Press

and Storage Co., and the shipment of the said cotton thereby changed from the Anchor line to the defendant The C., O. & S. L. R. R., one of the constituents of the N. N. & M. V. Co., so your orators show that when the said cotton was destroyed by fire it was in possession of the C., O. & S. W. R. R., which is a corporation by the laws of Tennessee, and the N. N. & M. V. Co., which is a corporation by the laws of Connecticut, and the receivers aforesaid are jointly liable to them for the value of the said cotton.

The premises considered, your orators pray as in the bill
461 of complaint and as in their cross-bill of complaint, except in so far as they seek relief against the Cairo, Vincennes & Chicago line as a corporation. In lieu thereof they pray for judgment against Anthony J. Thomas and Chas. E. Tracy as receivers of the Cairo division of the Wabash, St. Louis and Pacific R'y Co., and that the assets, including the trust fund in the hands of the Merchants' Cotton Press & Storage Co., the liability of the Merchants' Cotton Press and Storage Company for breach of contract with the said receivers, the amount due from the defendant insurance companies by virtue of the several policies hereinbefore mentioned, be impounded by proceedings in garnishment or in the nature of garnishment to respond to the judgments to be rendered against the said receivers, and that they may have decrees
462 respectively for the value of all the several lots of cotton mentioned in the pleadings against Anthony J. Thomas and Chas. E. Tracy, and that they may have decrees respectively, not only against Thomas & Tracy, but against the Newport News & Mississippi Valley Co. and the Chesapeake, Ohio and Southwestern R. R. Co. jointly for the value of the lots of cotton hereinbefore mentioned, held for shipment by the Newport News and Mississippi Valley Company and the Chesapeake, Ohio and Southwestern R'y Co. and the receivers, embracing the lots aggregating 948 bales.

And your orators further pray that the Merchants' Cotton Press & Storage Co., a corporation by the laws of Tennessee; S. R. Montgomery, Napoleon Hill, and Thomas H. Allen, Jr., residents of Shelby county, Tennessee, and as trustees only; the Royal In-
463 surance Company, an alien corporation or joint stock company; the Continental Insurance Company, a corporation by the laws of New York; the Liverpool, London & Globe Insurance Company, an alien joint stock company; the Fire Association, a corporation by the laws of New York; the National Insurance Company, a corporation by the laws of the State of Connecticut; the British & Foreign Insurance Company, Limited, a corporation or joint stock company of the the United Kingdom of Great Britain & Ireland; Lloyd's Companies, an association of assurers, subjects of the United Kingdom of Great Britain & Ireland; the Rhenish Westphalian Insurance Company, an alien joint stock company or corporation; the underwriters at Lloyd's, whose names are unknown and aliens, subjects of the United Kingdom of Great Britain
464 & Ireland; the Union Fire and Marine Company of New Zealand, an alien corporation or company; the Ulster Marine Insurance Company, also an alien and a joint stock company

or corporation; the Standard Marine Insurance Company, Limited, an alien joint stock company or corporation, and Wm. Watson and E. R. Wood, aliens and subjects of the United Kingdom of Great Britain and Ireland and doing business at Memphis, Tenn., as Watson, Wood & Co.; the N. N. & M. V. Co, a corporation by the laws of the State of Connecticut, and the Chesapeake, Ohio and Southwestern R'y, a corporation by the laws of Tennessee, and the Union Marine Insurance Company, Limited, be made defendants hereto; that copy & subpœna issue to them upon this amended bill requiring them and each of them to appear and answer
465 the allegations by the next term of this court, but not under oath, their respective oaths being waived.

That Anthony J. Thomas & Chas. E. Tracy be declared liable to the plaintiffs respectively for the value of the several lots of cotton covered under the bills of lading of the C., V. & C. line, and that the contract provided for the indemnity of the Cairo & Vincennes R. R. and its receivers be enforced by appropriate decree of this court in favor of your orators respectively and as against the Merchants' Cotton Press & Storage Co.

That the funds in the hands of the Merchants' Cotton Press & Storage Co. be applied to judgments to be rendered against the said receivers; that for the loss of the 948 bales of cotton hereinbefore set forth and made out the lots hereinbefore stated, your orators have as to the several lots owned respectively by them decrees
466 against Anthony J. Thomas and Chas. E. Tracy and the N. N. & M. V. Co. and the C., O. & S. W. R. R. Co.; that the order of the liability of these last-named defendants be declared.

That the defendant insurance companies whose policies covered cotton which was not held under the bills of lading of the C., V. & C. line be decreed not entitled to share in the insurance fund collected and in possession of the Merchants' Cotton Press & Storage Company, or to have any rights whatever against your orators, the Phœnix Insurance Company, on account of the Phœnix Insurance Co.'s having the three policies mentioned in the original bill of complaint and in its answer & cross-bill.

That the trusts created by the deed, marked Exhibit 48, to the original bill be declared in favor of defendants Anthony J.
467 Thomas & Chas. E. Tracy, and their interest in the said lot and parcel of land described in said Exhibit 48 be ascertained and described and the said lot or parcel of land subjected to sale and the proceeds distributed according to the provisions of the trust deed and among the persons entitled to share therein; that all rights and priorities in respect of the said fund be declared and reference be had to ascertain who are entitled to share in the same, and that your orators have whatever other and further relief may appear meet and proper, whether the said relief be general or special.

And your orators, the Insurance Company of North America of Philadelphia, the Atlantic Insurance Company, the Providence Washington Insurance Company, R. H. Deming & Co., and the Phœnix Insurance Company, and Anthony J. Thomas and Chas.

E. Tracy, suing for the use of the Delaware Insurance Com-
468 pany in its own behalf as to each and every one of the persons named and mentioned as defendants in the caption of the original bill or otherwise, and in the cross-bill of R. H. Deming & Co. for use, and the cross-bill of the C., V. & C. line and Anthony J. Thomas and Chas. E. Tracy for use, &c., who are not named as parties to the amended bill, dismiss the said original bill of complaint and the said cross-bills and pray that the court grant them leave to pay the costs incurred in making the said parties defendant.

TAYLOR & CARROLL,
Sol's for Compl'ts.

I am surety for costs.

W. H. CARROLL.

STATE OF TENNESSEE, }
County of Shelby. }

Personally appeared before T. B. Caldwell, deputy
469-473 clerk and master of the chancery court of Shelby county, W. H. Carroll, who made oath in due form of law that he is attorney for complainants, and that the statements made in the foregoing amended bill and cross-bills are true to the best of his knowledge, information, and belief.

W. H. CARROLL.

Sworn to and subscribed before me this 22nd day of Sept., 1891.

T. B. CALDWELL,
D. C. & M.

474 *Answer & Cross-bill of A. J. Thomas & C. E. Tracy, Receivers, &c.*

Filed Sept. 24th, 1891.

In the Chancery Court of Shelby Co., Tennessee.

STATE OF TENNESSEE, }
Shelby County. }

Original bill.

THE INSURANCE COMPANY OF NORTH AMERICA OF PHILADELPHIA and Others
versus
THE DELAWARE MUTUAL SAFETY ASSURANCE Co. and Others.

Cross-bill.

RICHARD HENRY DEMING and JAMES HERBERT FOSTER, Partners under the Firm Name of R. H. Deming & Co., for the Use of the Phœnix Insurance Company, and the Phœnix Insurance Company in Its Own Behalf

versus

THE INSURANCE COMPANY OF NORTH AMERICA, THE
475 Delaware Mutual Safety Assurance Company, The Newport News & Mississippi Valley Railroad Company, & Others.

The answer of Anthony J. Thomas and Chas. E. Tracy, as receivers of the Cairo division of the Wabash, St. Louis & Pacific railway under appointment by the circuit court of the United States for the southern district of Illinois.

Now and at all times hereafter saving and reserving unto themselves as such receivers all benefit and advantages of exception which can or may be had or taken to the many errors, insufficiencies, and other imperfections of the said above-entitled original bill of complaint and to the above-entitled cross-bill, for answer therto or to *do* much of such parts thereof as these respondents as such receivers are advised it is material or necessary to make answer unto, by leave of the circuit court of the United States
476 for the southern district of Illinois first *only* had and obtained, answering, say:

That on or about October the 15th, A. D. 1884, respondents Anthony J. Thomas and Charles E. Tracy were duly and legally appointed and substituted as trustees in the Cairo Division mortgage of the Wabash, St. Louis & Pacific Railway Company in the place of and as successors to the Mercantile Trust Company of New York, original trustees in said Cairo Division mortgage.

That the Wabash, St. Louis and Pacific Railway Company was, by virtue of consolidations, a corporation of the several States of Missouri, Illinois, Indiana, and Ohio; that one of the many lines owned and operated by the Wabash, St. Louis & Pacific Railway Compaay was the said Cairo division, the same being a line
477 of railway extending from the Ohio river, at the city of Cairo, in the county of Alexander, in the State of Illinois, to Tilton, in the county of Vermillion, in the State of Illinois, together with a branch extending from St. Francisville, in the county of Lawrence, in the State of Illinois, to Vincennes, in the county of Knox, in the State of Indiana.

That on or about April 4th, 1885, the said respondents, Thomas & Tracy, as such trustees in the said Cairo Division mortgage of the Wabash, St. Louis & Pacific Railway Company, filed in the circuit court of the United States for the southern district of Illinois their bill in equity for the foreclosure of the said Cairo Division mortgage.

That afterwards, to wit, on or about April 22nd, 1885, said re-

spondents, Anthony J. Thomas and C. E. Tracey, were ap-
478 pointed receivers of the said Cairo division of the Wabash, St. Louis & Pacific railway by the order of the circuit court of the United States for the southern district of Illinois, duly entered in the said foreclosure proceedings in the said cause of Anthony J. Thomas and Chas. E. Tracy, trustees, &c., *vs.* The Wabash, St. Louis & Pacific Railway Company & others, and immediately entered into the possession of and continued the operation of the said Cairo division as such receivers.

Respondents Thomas & Tracey, further answering, say that they admit that at the time of their appointment as such receivers they were, ever since have been, and still are citizens of the State of New York, and that in the fall and winter of the year 1887 they were the receivers of the said Cairo division of the Wabash, St. Louis & Pa-
cific railway, commonly known as the Cairo, Vincennes &
479 Chicago line, and were then operating the said railway as such receivers and not otherwise.

They further admit that, as such receivers so operating said line of railway, they solicited cotton shipment at Memphis, Tennessee, through their general agent, L. L. Fellows, only accredited to represent them as such receivers of the said Cairo, Vincennes & Chicago line.

Respondents Thomas & Tracey, as such receivers, admit that in order to obtain cotton shipments in the said City of Memphis they conformed to the local usage established in the said city by the Merchants' Cotton Press & Storage Company and the cotton shippers, by and under which local usage said receivers were required to issue their bills of lading upon cotton when delivered by the ship-
pers and brokers to the Merchants' Cotton Press & Storage
480 Company of Memphis, Tennessee, providing for full protection and indemnity for themselves as such receivers of the Cairo, Vincennes & Chicago line and for their customers transporting cotton by their said line, a true copy of which said written contract is hereto attached and filed herewith, marked "Exhibit A," and prayed to be taken as part of this answer & cross-bill.

Respondents further say that their purpose in consummating the aforesaid contract was to provide in their behalf, as such receivers, operating said line of railway, and in behalf of their customers, a liability of the said compress company in the event of the destruction of cotton by fire while in the possession of and upon the premises of the said compress company and while covered by bills of
lading issued by them as such receivers of said railway line,
481 by their general agent, and also to require the said compress company to take out policies of insurance in good & solvent companies, so as to cover every interest in the cotton covered by the Cairo, Vincennes & Chicago line bills of lading, and thus provide an indemnity fund which should stand in lieu of the full value of the cotton which might be destroyed while yet in the presses of and in the possession and control of the said Merchants' Cotton Press and Storage Company.

Respondents are informed and upon information admit that the

insurance companies plaintiffs in the original bill herein respectively had outstanding marine policies that covered the loss of cotton mentioned in the original and cross bills herein when
482 they were destroyed by the fire of Nov. 17th, 1887, in compress No. 4, in the city of Memphis.

Respondents are informed and upon information admit that after the execution of the said contract, "Exhibit" "A," hereinabove mentioned and set forth and in part performance of the obligation imposed upon the Merchants' Cotton Press and Storage Company thereby, it had procured in the insurance companies defendants in the original bill herein policies of fire insurance in the several amounts set forth in the said original bill, to which this is an answer; that the purpose of these respondents, as such receivers aforesaid, and of the said Merchants' Cotton Press & Storage Co. was to provide indemnity by the said insurance against any loss by fire of cotton while yet in the possession of and upon the premises
482½ of said Merchants' Cotton Press & Storage Company and covered under the bills of lading of the Cairo, Vincennes & Chicago line, issued pursuant to said contract, "Exhibit A," hereinabove set forth.

Respondents admit that the Shore mills had 150 bales of cotton destroyed by said fire, and that a true copy of the bill of lading issued to the shippers is marked "Exhibit A" of the original bill herein.

Respondents admit that the Union Manufacturing Company had 50 bales of cotton destroyed by the said fire covered under one of their bills of lading, a true copy of which is marked "Exhibit E" of the original bill herein, and that the Tecumseh mills had destroyed in same fire 100 bales of cotton covered under a bill of lading issued by respondents, as such receivers as aforesaid, a
483 true copy of which is marked Exhibit "C" of the original bill herein.

Respondents are informed and upon information they admit that the respective marine policies of insurance hereinbefore mentioned covered the said lots of cotton as stated and the amounts have been paid as alleged in the original bill herein.

Respondents say that they are informed and upon information — the value of the 150 bales of cotton of the Shore mills at the date of *its* destruction was about $6,791.58; that the value of the 100 bales of cotton of the Tecumseh mills at the date of *its* destruction was about $5,003.24, and that the value of the 50 bales of cotton of the Union Manufacturing Company at the date of *its* destruction was about $2,462.20.

Respondents, further answering, say that they are informed
484 and upon information admit that after the said fire occurred the cross-plaintiffs Richard Henry Deming and James Herbert Foster, partners under the firm name of R. H. Deming & Co., made claims against the Phœnix Insurance Company for the value of 2,314 bales of cotton destroyed by said fire, which were covered under the bills of lading of these respondents, as such receivers of the Cairo, Vincennes & Chicago line, issued by their said general

agent, L. L. Fellows, and that the several lots of cotton which aggregated the aforesaid number of bales are correctly set forth in the cross-bill of R. H. Deming & Co. and the Phœnix Ins. Co. herein.

Respondents, further answering, say that they are informed and upon information admit that the aggregate value of the 2,804 bales of cotton when destroyed by said fire was about the sum of
485 $137,820 and 74 cents; they admit the destruction of the said 2,804 bales of cotton by the aforesaid fire of November 17th, 1887; upon information respondent- also admits that the original bill of lading delivered by their agent to the shippers was produced in the consolidated compress cases for each of the said lots of cotton and identified, and that the true copy of each of said bills of lading is filed with and made part of the original bill herein.

Further answering, these respondents, as such receivers, say that they are informed and upon information admit that the Phœnix Insurance Company also issued its policies of insurance to the Hill Manufacturing Company, the King Philip mills, the Troy cotton & woolen mills, and to the Totoket mills, and that each of the
486 above-named corporations had the lot of cotton mentioned in the original and cross bill- herein destroyed by the fire of November the 17th, 1887, and covered under the bill of lading of these respondents.

Respondents further, upon information, admit that the 500 bales of cotton of the Hill Manufacturing Company *was* at the time of *its* destruction by said fire of the value of about $25,082.00; that the 105 bales of cotton of the King Philip mills *was* at the time of *its* destruction by said fire of the value of about $5,791.88; that the 100 bales of cotton of the Troy cotton & woolen mills — at the time of *its* destruction by said fire of the value of about $4,997.69; that the two lots of cotton of 50 bales each of the Totoket mills were at the time of their destruction by said fire of the aggregate value of about $5,446.18, and that the exhibits alleged in the original
487 and cross bills herein to be true copies of the original bills of lading covering said lots of cotton are what they are stated to be.

These respondents are not advised as to whether the two lots of cotton mentioned in the original bill herein, namely, 50 bales of Hooper & Buffington and 10- bales of E. H. Coates & Co., were excluded from the cotton covered under the bills of lading of the Cairo, Vincennes & Chicago line in reserving the rights of the parties to the trust fund the Merchants' Cotton Press & Storage Company was required to collect & hold.

But respondents admit and aver that the Merchants' Cotton Press & Storage Company is responsible to them, as such receivers as aforesaid, for any deficit between the amount paid and to be paid under the decrees of the supreme court to the above parties
488 and the actual value of the aforesaid lots of cotton at the time of their destruction by said fire.

Further answer-, these respondents, as such receivers as aforesaid, aver that the shippers of all of the aforesaid lots of cotton and the

lots hereinafter to be mentioned expressly assume "fire and marine" risk "from Memphis to Cairo, Illinois," in and by the several bills of lading issued by respondents, as such receivers, and accepted by said shippers.

Respondents further aver that in order to evidence that contractual stipulation between them & said shippers there was actually stamped on the face of each bill of lading the following legend, viz., via river to Cairo, marine and fire risk expressly assumed by the shipper, owner, or consignee from Memphis until landed
489 at Cairo, Ill., and that in all cases in which said legend was not stamped on the face of the bill of lading before it was delivered to and accepted by the shipper other words were written upon the face of the bill of lading, clearly indicating that the fire and marine risk from Memphis to Cairo, Illinois, was expressly assumed by the shipper, thereby relieving respondents, as such receivers, from all liability by reason of fire and marine risk upon the lots of cotton covered by their bills of lading until said cotton was landed at Cairo, Illinois, the southern terminus of their line of railway.

Respondents further aver that it was well known to all of the shippers who received and accepted the said bills of lading issued by respondents as such receivers, as hereinabove admitted and stated, that said respondents, as such receivers, *as hereinabove admitted and stated, that said respondents, as such receivers,*
490 have and control no transportation line from Memphis to Cairo, Illinois, and well knew that respondents, as such receivers, proposed and intended to procure the lots of cotton covered by their bills of lading to be delivered by the said Merchants' Cotton Press and Storage Company after the same had been by said company compressed, the steamboats or barges belonging to other carriers, to be transported from Memphis to Cairo, or to other railroad lines operating between Memphis & Cairo, and said shippers and brokers well knew and understood all the time they accepted the several bills of lading that it was the express purpose and intention of respondents, as such receivers, to cause all of the cotton covered by their said bills of lading, unless expressly otherwise stipu-
491 lated in the bills of lading, to be transported from the premises and landing of the Merchants' Cotton Press & Storage Company to Cairo, Illinois, by river.

Respondents admit that all of the several lots of cotton hereinabove referred to and hereinafter to be referred to were destroyed by fire on or about Nov. 17th, 1887, while in the possession of the Merchants' Cotton Press & Storage Company and under the control of that company and before delivery by said Merchants' Cotton Press and Storage Company *and under the control of that company and before delivery by said Merchants' Cotton Press & Storage Company* to respondents as such receivers as aforesaid.

Respondents, further answering, say that they were advised that they did not incur the liability of a common carrier before
492 the cotton for which their bills of lading were issued was loaded onto boats or cars by the Merchants' Cotton Press &

Storage Co. under and in obedience to directions given by their agent at Memphis, but they required, prior to entering upon the business of transporting cotton from Memphis and deliver- bills of lading for such cotton at the Merchants' Cotton Press & Storage Company — received in exchange for the receipts of said company, a contract of that company, whereby, among other things, that company stipulated, for the consideration in said contract set forth, to carry insurance for the benefit of these respondents as such receivers in good and solvent companies, so as to cover any loss while the cotton was in possession and in the control of the said Merchants' Cotton Press and Storage Company and until delivered to these respondents or their agents, in order to protect them and their customers against the possibility of loss until the actual transfer of such cotton commenced. This they did to provide a fund which should be amply sufficient to take the place of any cotton which might be destroyed by fire while on the premises and in the possession or custody of the Merchants' Cotton Press & Storage Company.

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Further answering, respondent- admits that a short time before the said fire their general agent was notified by some employee of the Newport News & Mississippi Valley R'y Co. that Jones Bros. & Co., shippers of nearly the entire cotton hereinabove mentioned, had procured some of the lots of said cotton to be received into the cotton-press buildings and premises of the Merchants' Cotton Press & Storage Co. upon the permits of the freight agent of the Newport News & Mississippi Valley R'y Co.

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Respondents admit that the Merchants' Cotton Press & Storage Company and the Newport News & Mississippi Valley R'y Co., as to those lots of cotton, insisted that they should be transported from Memphis to Cairo by the Newport News & Mississippi Valley R'y Co., and that accordingly the agent of these respondents, L. L. Fellows, made a contract with the agent of the Newport News & Mississippi Valley R'y Co. at Memphis, W. R. McIntosh, for the shipment of said lots of cotton, and said lots of cotton were thereupon accepted for transportation by the agent of the Newport News and Miss. Valley R'y Co., and were then destroyed by said fire under the control of the Newport News & Mississippi R'y Co., according to the usage at Memphis for transportation.

495

Respondents say that said lot of cotton so turned over and accepted by the agent of the Newport News & Mississippi Valley Railroad Company for transportation from Memphis aggregated 948 bales, the marks of said lots of cotton making up said aggregate being as follows, viz: 105 bales marked Brix; 25 bales marked Cixi; 100 bales marked Ages; 100 bales marked Aple; 100 bales marked Bush; 50 bales marked Baus; 100 bales marked Made; 100 bales marked Cows; 100 bales marked East; 100 bales marked Bosm, and 23 bales marked Besx.

Respondent- further says that these lots of cotton when so turned over and surrendered by respondents' agent, L. L. Fellows, to said W. R. McIntosh, as agent of the Newport News & Mississippi Val-

ley Railroad Company, for transportation by said last-named
496 company, were in the compress or press shed that served the Newport News & Mississippi Valley Company and was commonly known as its compress. It controlled exclusively as the owner the railway tracks that led to that particular compress.

Respondents' agent, Fellows, having made a contract with said McIntosh, agent for the Newport News & Mississippi Valley Railroad Company, for the shipment of the said 948 bales of cotton from Memphis to Cairo by the Newport News & Mississippi Valley Railroad Company, and the said cotton being then at the place where the said agent, McIntosh, received cotton for transportation, delivery thereof by respondents to the Newport News & Mississippi Valley Railroad Company was effected by the said contract made and entered into by and between Fellows as agent for re-
497 spondents and McIntosh as agent for the Newport News & Mississippi Valley Railroad Company.

Pursuant to this contract, shipping directions concerning said 948 bales of cotton were made out by respondents' agent, Fellows, changing the shipment of said cotton from the Anchor line to the Chesapeake, Ohio and Southwestern railroad, that being one of the constituents of the Newport News & Mississippi Valley railroad, and a rail route to Cairo either via Reeves or Fulton, and delivered to the compress company, together with the dray tickets covering the aforesaid 948 bales of cotton. These shipping directions were approved by the said McIntosh, and the said cotton thereupon became appropriated to the aforesaid contract of the Newport News & Mis-
498 sissippi Valley Railroad Company by its agent, McIntosh, for the transportation thereof.

And respondents aver that the original papers evidencing the acceptance of said lots of cotton by the said W. R. McIntosh as agent of the Newport News & Mississippi Railroad Company are attached to and made a part of the deposition of the said L. L. Fellows, taken in the consolidated compress cases heretofore pending and determined in the chancery court of Shelby county, Tennessee, the same being Exhibits Nos. 4 & 5 to the answer of said L. L. Fellows to interrogatory No. 55 of said deposition, to which said original papers respondents here now beg leave to refer with the same force and effect as though hereto attached and made part of this answer.

These respondents admit that they have, through their so-
499 licitor, requested the Merchants' Cotton Press & Storage Company to collect the fire insurance and to pay the persons entitled the ratable share due to each, and to pay any deficit out of its own funds under and *in* pursuant to the terms and stipulations of its contract with these respondents as such receivers, so that the controversy growing out of the loss of the aforesaid cotton and all other cottons destroyed in the aforesaid fire and covered by respondents' bill of lading might be finally and expeditiously settled. The respondents say that they are informed and upon information aver that the Merchants' Cotton Compress & Storage Co. has wholly failed to collect any part of the fire insurance applicable to the in-

demnity of respondents under their said contract, and they
500 are advised that the company has made no *bona fide* effort to do so.

Respondents admit that the railroad known as the Cairo, Vincennes & Chicago line formed part of the railway of the Wabash, St. Louis & Pacific Railway Company until it was severed from the railroad and property of said company by and under the foreclosure proceedings brought by respondents Thomas & Tracy, as trustees in the Cairo Division mortgage of the Wabash, St. Louis & Pacific railway, as hereinbefore stated.

They further admit that the Wabash, St. Louis & Pacific Railroad Company was a corporation non-resident in the State of Tennessee and never was a corporation under the laws of said last-named State.

Respondents further admit, as has hereinbefore been ad-
501 mitted, that they, as receivers possessing and operating the said Cairo, Vincennes & Chicago line, had a general agent in the State of Tennessee soliciting business at Memphis; that they withdrew said agents immediately after said fire, but not for the purpose of avoiding the service of process, but because they were dissatisfied with the usages and methods at Memphis for the procurement of cotton shipments and determined to no longer comply with said usages and methods.

Respondents further admit that if they are held liable at all under their said bills of lading the sum of four thousand three hundred and ninety-four dollars and twelve cents, with interest, is their ratable proportion of the sum of $52,472.26, being the amount
502 coming to them that the Merchants' Cotton Press and Storage Company wrongfully appropriated, as alleged in the original bill and cross-bill herein.

Respondents, further answering, aver that they, as such receivers aforesaid, and the Cairo, Vincennes & Chicago line, which were then operating as such receivers, are not, either in law or equity, liable in damages for any or either of the lots of cotton covered under their said bills of lading and destroyed by said fire of November 17th, 1887.

They aver that each and every of their said bills of lading contained, clearly printed on the face thereof, the following clear, explicit, and distinct conditions, stipulations, and exceptions exempting them from any liability for loss or damages by fire of
503 said lots of cotton while covered by their said bills of lading and at the time said lots of cotton were destroyed by fire, to wit:

"The C., V. & C. L. and forwarding lines with which it connects shall not be liable for loss or damages by wet, dirt, fire, or for loss of weight or for condition of bailing on hay, hemp, or cotton, * * * nor for loss or damages to any article of property whatever by fire or other casualty while in transit or while in depots or other places of trans-hipment, or at depots or landings at points of delivery, nor for loss or damages by fire, collision, or the dangers of navigation while on the seas, rivers, lakes, or canals. * * *

"In accepting this contract the shipper or other agent of the owner of the property carried expressly accepts and agrees to all the stipulations, exceptions, and conditions."

504 Respondents aver that the said conditions, stipulations, and exemptions from liability were embodied and set forth in the said "fire clause" of their said bills of lading above set forth, and were founded upon good and sufficient considerations, and were just, equitable, and reasonable.

Respondents further aver that the compress sheds and premises of the Merchants' Cotton Press & Storage Company at Memphis were long prior to and at the time of said fire of November 17th, 1887, well known and recognized as the chief place of trans-hipment of cotton in the city of Memphis.

505 That the said compress company's sheds and premises were then well known and recognized as constituting the chief depot and river landing for the handling and shipment of cotton in the said city of Memphis, and that besides being the chief river landing for the shipment of cotton several railroad companies had railway tracks to said compress shed as to a common freight depot, and constantly used said sheds and premises as a general depot for the trans-hipment of cotton, all of which facts were well known and recognized by the shippers accepting said bills of lading issued by respondents through their said agent, Fellows, at the time they accepted said bills of lading.

Respondents further aver that they issued their said bills of lading and the shippers of the cotton covered thereby accepted said bills of lading with full knowledge of all these facts above set forth and in due contemplation of them.

506 Respondents further aver that they issued said bills of lading in good faith, fully relying upon the said conditions, stipulations, and exemptions from liability therein contained, as hereinabove set forth, and that they, as receivers operating the Cairo, Vincennes & Chicago line, and each and every of their agents and employees, were without any fault or negligence that caused or contributed to cause the loss by the said fire of November 17th, 1887.

Wherefore they say that they are not in any manner liable therefor.

Further answering, respondents say that they admit that if they are finally held and adjudged to be liable under their said bills of lading, notwithstanding the conditions, stipulations, and

507 exemptions therein contained, each of the fire insurance companies is equitably indebted to them in an amount equal to the balance due upon their respective policies, less the amount paid and to be paid in exoneration of other carriers' liability, that was adjudged in the decree entered in the supreme court in the Consolidated Compress cases.

Further answering, *their* respondents aver that if they are finally held and decreed liable under their said bills of lading, notwithstanding the conditions, stipulations, and exemptions otherwise contained, then and in that case they have an equitable interest in

the certain lot or parcel of land described in the deed marked Exhibit "48" and made part of the original bill herein, said lot or parcel of land being known in the proceedings in this cause
508 as the "Senatolia-street property" and mentioned and referred to in the cross-bill of R. H. Deming & Co. and the Phœnix Insurance Co.

And now, having fully answered, these respondents pray that they may be dismissed without costs; and they further pray, if they shall be finally held and decreed liable under their said bills of lading, it may — decreed that an indemnity against their aggregate liability, the fire-insurance fund now in the possession of the compress company and the insurance fund to the amount of $210,249, with interest, which it was ordered and decreed by said supreme court that it was the duty of the compress company to collect and hold, with interest until the liability of the Cairo, Vincennes & Chicago line shall have been established, be applied thereto, and that their interest in the Senatolia-street property mentioned
509 and described in the original bill herein may be declared, decreed, and established, and that they may have such other and further relief as may be just, suitable, and equitable.

Cross-bill.

And now, by way of cross-bill, Anthony J. Thomas and Chas. E. Tracey, as receivers of the Cairo division of the Wabash, St. Louis & Pacific railway, commonly known as the Cairo, Vincennes & Chicago line, who were as such receivers in full possession of and operating said line of railway prior to and subsequent to Nov. 17th, 1887, by leave of the circuit court of the United States for the southern district of Illinois, first duly had and obtained, bring this their cross-bill against The Merchants' Cotton Press & Storage Co., a corporation by the laws of the State of Tennessee, made a
510 defendant in the original bill herein; The Insurance Company of North America of Philadelphia, a corporation by the laws of the State of Pennsylvania; The Atlantic Insurance Company, a corporation by the laws of the State of New York; The Providence Washington Insurance Company, a corporation by the laws of the State of Rhode Island, complainants in the original bill herein, and The Phœnix Insurance Company, a corporation by the laws of the State of New York; The Marine Insurance Company, Limited, of London, resident of the United Kingdom of Great Britain & Ireland; The British and Foreign Marine Insurance Company, Limited, of Liverpool, England, resident of the Kingdom of Great Britain & Ireland; The Union Marine Insurance Company, Limited, resident of United Kingdom; The Continental Insurance Company, a corporation by the laws of the State
511 of New York; The Liverpool & London and Globe Insurance Company, resident of the United Kingdom of Great Britain and Ireland; The Fire Association, a corporation by the laws of the State of New York; The National Fire Insurance Company, a corporation by the laws of the

State of New York; The National Fire Insurance Company, a corporation by the laws of the State of Connecticut; The Phœnix Insurance Company, a corporation by the laws of the State of New York; The Royal Insurance Company, resident of the United Kingdom of Great Britain & Ireland, all made defendants in the orginal bill herein, and The Newport News & Mississippi Valley Railroad Company, a corporation by the laws of the State of Connecticut, made defendants to the cross-bill of Richard Henry Deming and James Herbert Foster, partners as R. H. Deming & Co., and
512 The Phœnix Insurance Company herein; and thereupon cross-complainants Anthony J. Thomas & Chas. E. Tracy aver:

1. That long prior to and on Nov. 17th, 1887, they were, ever since have been, and still are citizens and residents of the State of New York; that on October 1st, 1881, the Wabash, St. Louis and Pacific Railway Company, then owning, among many other lines of railway owned by said company, a certain line of railway extending from the Ohio river at the city of Cairo, Alexander county, State of Illinois, to Tilton, Vermillion county, State of Illinois, together with a branch extending from St. Francisville, Lawrence county, State of Illinois, to Vincennes, Knox county, in the State of Indiana, executed its mortgage of deed of trust known as its Cairo Division mortgage, covering & conveying said above-described line of railway.

513 That on or about October 15th, 1884, cross-complainants Thomas & Tracy were duly & legally appointed and substituted as trustees in said Cairo Division mortgage, as successors to the Mercantile Trust Company, the original trustees therein; that on April 4th, 1885, cross-complainants Thomas & Tracey, as trustees in said Cairo Division mortgage of the Wabash, St. Louis and Pacific Railway Co., brought in the circuit court of the United States for the southern district of Illinois their bill in equity for the foreclosure of said Cairo Division —; that on or about April 22nd, 1885, said cross-complainants, Thomas & Tracey, were appointed receivers of the said railway and the property covered and conveyed by said Cairo Division mortgage by order of the circuit court of the
514 United States for the southern district of Illinois, duly entered in the foreclosure suit and proceedings hereinabove mentioned; that immediately after their said appointment as such receivers they entered into full and complete possession of said railway and property theretofore known as the Cairo division of the Wabash, St. Louis & Pacific railway, and continued the operations thereof as such receivers.

That by said foreclosure proceedings and their said appointment as receiver- thereunder the said line of railway and property of the Wabash, St. Louis and Pacific Railway Company *and* has never since been in the possession, ownership, or control of the Wabash, St. Louis & Pacific Railway Company; that at the time of such severance the Wabash, St. Louis & Pacific Railway Company was, by various consolidatinns, a corporation of the several States
515 of Missouri, Illinois, Indiana, & Ohio, but never was a cor-

poration by the laws of the State of Tennessee or resident of said State; that for the purpose of making known and emphasizing the severance of said line of railway from the other lines of said Wabash, St. Louis & Pacific Railway Company, the cross-complainants as receivers operated said line of railway under the name and style of the Cairo, Vincennes & Chicago line, by and under which name and style cross-complainants, as such receivers, were operating said line of railway prior to and on Nov. 17th, 1887.

2. The cross-complainants, as such receivers, stationed an agent at the city of Memphis, Tenn., for the purpose of procuring cotton shipments over their said line of railway mentioned and eastward from the city of Cairo, Illinois; that on May 24th, 1887, cross-complainants, as such receivers, made and entered into a certain
516 contract in writing with the Merchants' Cotton Press and Storage Company, defendant herein, a true copy of which said contract is attached hereto, marked Exhibit "A," filed herewith, and hereby made a part of this cross-bill; that in and by said contract in writing the Merchants' Cotton Press & Storage — stipulated and contracted to take out for the benefit of the cross-complainants, as such receivers of the Cairo, Vincennes & Chicago line, insurance in good & solvent companies so as to cover any loss of cotton contracted for transportation by cross-complainants as such receivers while said cotton remained in the possession of & under the control of the said Merchants' Cotton Press & Storage Company and until delivered by said Merchants' Cotton Press & Storage Company, either to steamboats or in railroad cars, to said cross-complainants as such receivers or their agents.

517 3. That afterwards, to wit, on or about Nov. 17th, 1887, the compress and compress shed numbered 4 of the Merchants' Cotton Press & Storage Co., at Memphis, Tenn., were destroyed by fire, together with 2,804 bales of cotton, of the value of about $137,820.74, for shipment by Jones Bros. & Co. for account of R. H. Deming & Co.; 500 bales of cotton, of the value of about $25,082, for shipment by E. L. Dorr & Co. for account of the Hill Manufacturing Co.; 105 bales of cotton, of the value of about $5,791.88, for shipment by Jones Bros. & Co. for account of the King Philip mills; 100 bales of cotton, of the value of about $4,997.69, for shipment by Jones & Co. for account of the Troy woolen & cotton mills; 100 bales of cotton, of the value of about $5,416.18, for shipment by Jones Bros. & Co. for account of the Tetocket mills, the above-named lots of cotton being those named & described in the cross-bill of
518 R. H. Deming & Co. and the Phœnix Insurance Co. filed herein, and for the value of which the said Phœnix Ins. Co. is seeking to establish the liability of these cross-complainants as receivers; also 50 bales of cotton, of the value of about $2,462.20, for shipment by Jones Bros. & Co. for account of the Union Manufacturing Co., which last-named lot of cotton cross-complainants are informed and upon information aver was covered by the marine policy of the Atlantic Insurance Company; 150 bales of cotton, of the value of about $6,791.58, for shipment of Jones Bros. & Co. for account of the Shore mills, which last-named lot of cotton cross-

complainants are informed and upon information aver was covered by the marine policy of the Insurance Company of North America; 100 bales of cotton, of the value of about $5,003.24, for shipment by Jones Bros. & Co. for account of Tecumseh mills, the same being the lot of cotton
519 mentioned and described in the original bill herein as covered by the marine policy of insurance of the Providence Washington Ins. Co.; 50 bales of cotton, of the value of about $2,301, for shipment by Jones Bros. & Co. for the account of Hooper & Buffington; 100 bales of cotton, of the value of about $4,727.80, for shipment by Jones Bros. & Co. for account of E. H. Coates & Co.; 25 bales of cotton, of the value of about $1,406, for shipment by Jones Bros. & Co. for account of E. R. Robinson & Co., said last-named three lots of cotton being, as cross-complainants are informed and upon information aver, covered under the marine policy of the defendant The British & Foreign Insurance Company; 305 bales of cotton, of the value of about $15,848.94, for shipment by Jones Bros. & Co. for
520 account of the Warren Manufacturing Co.; 100 bales of cotton, of the value of about $5,161.97, for shipment by Jones Bros. & Co., also for account of the Warren Manufacturing Co., both of the said last-named lots of cotton being, as cross-complainants are informed and upon information aver, covered by the polices of insurance of the Marine Insurance Company of London, Limited, and 100 bales of cotton, of about the value of $5,346.24, for shipment by Jones Bros. & Co. for account of Foster & Nightingale, said last-named lot of cotton also being, as cross-complainants are informed and upon information aver, covered by the marine policy of insurance of the said Marine Insurance Company of London, Limited, all of said cotton being at the time it was destroyed by
521 fire covered under Cairo, Vincennes & Chicago Line bills of lading issued by L. L. Fellows, the duly accredited agent of these cross-complainants as receivers in possession of and operating said line of railway known as the Cairo, Vincennes & Chicago line, the said several lots of cotton having been delivered to the Merchants' Cotton Press & Storage Co. by the said above-named cotton brokers & shippers, Jones Bros. & Co. & E. L. Dorr & Co., and the said bills of lading having been issued and delivered to the said cotton brokers & shippers upon the delivery by them to the said agent, L. L. Fellows, all the dray tickets or receipts issued and delivered to said cotton brokers and shippers by the Merchants' Cotton Press & Storage Co. evidencing the receipt by said company of the cotton named in said dray tickets and receipts; that a day or two
522 before the said fire of Nov. 17th, 1887, the said L. L. Fellows, agent of cross-complainants as receivers as aforesaid, was informed, either by some employee of the said Merchants' Cotton Press & Storage Co. or by some employee of the Newport News & Mississippi Valley R'y Co., that some of the above-mentioned lots of cotton had been delivered to and accepted by the Merchants' Cotton Press & Storage Co. upon the permit of the Memphis agent for the Newport News & Mississippi Valley Railroad Co., and that it was insisted that said lots of cotton should be routed and trans-

ported by the initial carrier upon whose permit said lots of cotton had been received into the compress by the Merchants' Cotton Press & Storage Company; that thereupon the said L. L. Fellows, as agent of cross-complainants as such receivers, immediately turned over and surrendered to the control of W. R. McIntosh,
523 as agent at Memphis of the Newport News & Mississippi Valley Railroad Company, certain lots of cotton then in the compress sheds and premises of the Merchants' Cotton Press & Storage Company, aggregating 948 bales, and entered into a contract with said McIntosh, as such agent, for the transportation of said cotton *to* Memphis to Cairo, via Rives and Fulton, by the Chesapeake, Ohio and Southwestern railroad, that being one of the constituents of the Newport News & Mississippi Valley Railroad Company, and a railroad from Memphis to Cairo, either via Rives or Fulton; that the said lots of cotton which the said agent McIntosh so accepted, contracted, & agreed, as agent for the Newport News & Mississippi Valley Railroad Co., to transport from Memphis to Cairo were
524 marked as follows: 100 bales marked Bush, 50 bales marked Bans, 150 bales marked Made, 100 bales marked Bosm, 100 bales marked Cows, 200 bales marked East, 23 bales marked Besx, 100 bales marked Brix, 25 bales marked Cixi, 100 bales marked Ages, and 100 bales marked Aple, the same being the particular lots & marks of cotton that had been received into the compress by the Merchants' Cotton Press & Storage Company upon the permits of said McIntosh, as agent of the Newport News & Mississippi Valley Railroad Co.; that at the time said transportation contract was made and entered into by and between Fellows, as agent for cross-complainants' receivers, and McIntosh, as agent for the Newport News & Mississippi Valley R'y Co., the said lots of cotton, the subject of said contract,
525 were then in the particular compress or compress shed that served the Newport News & Mississippi Valley Railroad Co. and was known as its compress; it controlled exclusively, as owner, the railroad tracks that led to that particular compress; that at the time the said contract was entered into, the said cotton being there at the place where the said McIntosh received cotton for transportation, delivery thereof was then and there made to and accepted by said McIntosh as such agent for the Newport News and Mississippi Valley Railroad Company as aforesaid; that the said Fellows, as agent for cross-complainants as such receivers, immediately made out shipping directions directing the Merchants' Cotton Press & Storage Co. to ship said lots of cotton from Memphis to
526 Cairo by the Chesapeake, Ohio & Southwestern railway, either by Rives or Fulton, and delivered the same, with the dray tickets or receipts covering said lots of cotton, to the Merchants' Cotton Press & Storage Company; that said McIntosh as such agent as aforesaid approved and confirmed said shipping directions by endorsing in writing on the back of said shipping directions, and that thereupon said lots of cotton became & were appropriated to the aforesaid contract between Fellows as agent and McIntosh as agent; that at the time of said fire said

lots of cotton were not in any manner in the possession of or under the control of their agent or agents, but were under the exclusive dominion of the Newport News & Mississippi Valley Railroad Company by its said agent, W. R. McIn-
527 tosh, and that if there is any liability — rest wholly upon the Newport News & Mississippi Valley Railroad Company and not upon the Cairo, Vincennes & Chicago line or upon cross-complainants as receivers thereof; that the original shipping directions having the written endorsement of the said W. R. McIntosh, as agent as aforesaid, above mentioned and referred to, are attached to the deposition of the said L. L. Fellows, taken and filed in the consolidated compress cases tried and determined in this court, as Exhibits 4 and 5, made parts of said deponent's answer to interrogatory No. 55 of said deposition.

4. That by the obligations imposed by the above-mentioned written contract of May 24th, 1887, "Exhibit A" with this cross-bill, it was the duty of the Merchants' Cotton Press & Storage Com-
527½ pany to take out in good and solvent insurance companies policies of insurance, so as to cover the full value of the several hereinbefore-mentioned lots of cotton, and by the said insurance thus taken out to provide a fund equal to the value of the aforesaid cotton at the time of its destruction; that in addition to the obligation imposed by said contract upon the Merchants' Cotton Press & Storage Company to take out in good and solvent insurance companies for the benefit of these cross-complainants, as receivers as aforesaid, insurance to cover any loss while such cotton was in the possession or under the control of the Merchants' Cotton Press & Storage Company and until delivered on steamboats or in cars to these cross-complainants or their agents, it was also the place and imperative duty of that company to collect the insurance thus taken out immediately after the said fire, and to continue to hold
528 said insurance moneys so collected in trust for the benefit of said cross-complainants as such receivers until the liability, if any, of these cross-complainants should be determined.

5. That the Merchants' Cotton Press & Storage Company wholly failed to comply and perform the conditions, stipulations, and obligations of its said written contract of May 27th, 1887, in this, to wit:

That it failed to take out insurance in good and solvent companies for the benefit of these cross-complainants, as such receivers, covering any loss while the cotton mentioned and described in the proceedings herein was in the possession and under the control of the said Merchants' Cotton Press and Storage Company, covered under these bills of lading of cross-complainants, but, on the con-
529 trary, in violation of the obligation of its said contract, it took out upon the aforesaid cotton in good and solvent companies insurance in the aggregate sum amounting to only about $200,000, and in utter disregard of the obligations imposed upon it by said contract it took out in insurance companies which were not "good and solvent companies," within the intent and meaning of said written contract, but were insolvent or wholly unauthorized to transact

business of insurance in the State of Tennessee under the laws thereof, *and* the aggregate amount of about $101,750; that only the following-named insurance companies were "good and solvent" companies, within the intent and meaning of said written contract, at the time the policies were taken out by the Merchants' Cotton Press & Storage Company upon said cotton pursuant to
530 said contract, namely, the Continental Insurance Co. of New York, the Liverpool & London & Globe Insurance Company of England, the Fire Association of New York, the Mutual Fire Insurance Company of New York, the National Fire Insurance Company of Connecticut, the Phœnix Insurance Company of New York, and the Royal Insurance Company of England, they being alone authorize to do business in the State of Tennessee by reason of compliance on their part with the laws of the State of Tennessee.

That the Merchants' Cotton Press & Storage Company is liable to cross-complainants for its failure to take out such insurance in good and solvent companies in the amount equal to the full value of the aforesaid several lots of cotton, with interest thereon from and after Nov. 17th, 1887, because said Merchants' Cotton
531 Press & Storage Company has not only failed to take out adequate insurance in good and solvent companies, but has wholly failed and refused to collect or attempt to collect the insurance taken out and carried by it on said cotton in good and solvent insurance companies and has wrongfully appropriated of the insurance paid over to it the sum of about $4,394.12, which was applicable to the indemnity of these cross-complainants, as such receivers, in case they are held and decreed liable, under their said bills of lading, for the loss of said cotton.

6. That under its said contract it was the plain and manifest duty of the Merchants' Cotton Press & Storage Company to take out for the benefit and indemnity of cross-complainants, as receivers as aforesaid, insurance in good & solvent companies authorized by the
532 laws of the State of Tennessee to transact insurance business in said State and amenable to the laws and judicial process of said State ample to cover the full value of all cotton while in its possession and upon its premises under and pursuant to said contract, and that it was its plain and manifest duty, immediately after destruction of said cotton by said fire, to collect, by suit or otherwise, all insurance held by it for the benefit and indemnity of cross-complainants, as such receivers as aforesaid, and all other carriers with which it had contracts of like tenor & effect, and to hold said insurance money so collected as trustees in trust for the benefit and indemnity of cross-complainants and all other carriers with which it had like contracts until the liability, if any there be, of
533 cross-complainants, as receivers as aforesaid, and other carriers holding like contracts might be adjudicated and determined, and that it was and is the further plain and manifest duty of said Merchants' Cotton Press & Storage Company, under its said contract with cross-complainants, to hold itself liable to respondent- in cash for any deficit in the said indemnity fund provided by said contract occasioned by its failure to take out and carry in-

surance in good & solvent companies amply sufficient to fully cover any loss that should occur by reason of the destruction of said cotton while in its possession and upon its premises under & pursuant to said contract, the true purpose, meaning, and intent of said contract being to hold cross-complainants, as such receivers,
534 absolutely harmless and indemnified as to all cotton covered by their bills of lading so long as the same remained in possession and upon the premises of said Merchants' Cotton Press and Storage Company.

But that the said Merchants' Cotton Press & Storage Company, in utter disregard of its duties and obligations imposed upon it by said contract, not only failed to take out insurance in good & solvent companies sufficient to cover the full value of said cotton as required by said contract, but after said fire failed and refused to collect the insurance it did hold in good and solvent companies and hold the same in trust for the benefit and indemnity of cross-complainants as receivers aforesaid, but, on the contrary, cross-complainants are informed and upon information aver the fact
535 to be that shortly after said fire said Merchants' Cotton Press & Storage Company entered into a combination or conspiracy with the several fire insurance companies last herein-*afore* mentioned, which said fire insurance companies are made defendants to this cross-bill, to prevent and defeat the collection of the insurance held by it in said fire insurance companies for the benefit and indemnity of cross-complainants and other carriers holding contracts of like tenor and effect with the said contract of cross-complainants; that in furtherance of said combination and conspiracy, as cross-complainants are informed and upon information aver the fact to be, said Merchants' Cotton Press & Storage Company and said fire insurance companies made and entered into an agreement and joint undertaking to make a common defense
536 against any liability, either upon the part of the Merchants' Cotton Press & Storage Company or said fire insurance companies, for the loss of any cotton destroyed by said fire, excepting only such cotton as rested upon dray tickets or receipts issued by said Merchants' Cotton Press & Storage Company and was not covered by or under any other contract or insurance, and that under and by reason of said combination, conspiracy, & joint undertaking pursuant thereto the said Merchants' Cotton Press & Storage Company has failed and refused, although requested to do so, to collect, receive, and hold as trustee, in trust for the benefit and indemnity of cross-complainants and other carriers holding like contracts with theirs, the insurance due from said insurance companies joining in said joint undertaking, and cross-complainants
537 aver that this action upon the part of the said Merchants' Cotton Press & Storage Company was in effect an agreement by it, as trustee, to defeat and destroy the trust for which it was trustee and was and is a gross violation of its said contract with cross-complainants, by reason whereof it is, in law and equity, liable to cross-complainants not only for the full amount of the insurance held by it in said companies combining in said joint undertaking,

together with interest thereon from the time the same should have been by it collected, but it is in said law and equity liable to cross-complainants for the full value of all cotton destroyed by said fire and covered under the bills of lading issued by cross-complainants as such receivers as aforesaid, and that by said combination, conspiracy, and wrongful acts of the said Merchants' Cotton Press &
538 Storage Company in connection with said fire insurance companies the said fire insurance companies have become and are in equity liable directly to cross-complainants and other carriers holding like contracts with theirs for the full amount named in the policies of insurance issued by them to the Merchants' Cotton Press and Storage Company, and that therefore the same Newport News and Mississippi Valley Railroad Company, as well as these cross-complainants, as such receivers as aforesaid, is intrusted in the collection of the fire insurance due from the said insurance companies which have issued policies covering cotton destroyed by the fire of November 17th, 1887.

Cross-complainants further aver that they are not advised as to the amount of the trust funds paid over to the Merchants'
539 Cotton Press and Storage Company since by decree of the supreme court of Tennessee that company was required to collect the policies of insurance effected by it, but cross-complainants say that they are advised that if the Merchants' Cotton Press & Storage Company has failed to collect insurance that was collect*a*ble it is liable to them by reason thereof.

7. In tender consideration whereof these cross-complainants pray that the Merchants' Cotton Press & Storage Co. and each and every of the parties, persons, and corporations named, mentioned, and set forth as defendants in the commencement of this cross-bill be made defendants to this cross-bill and required to answer the averments thereof, answer under oath being hereby waived; and cross-
540 complainants further pray that if it shall be finally held and decreed that cross-complainants, as receivers of the Cairo division of the Wabash, St. Louis & Pacific railway, known as the Cairo, Vincennes & Chicago line, are liable to the complainants in the original bill herein or to the cross-complainants in the cross-bill of R. H. Deming & Co., for the use of the Phœnix Insurance Company, and the Phœnix Insurance Company for the full value of all or any of the said lots of cotton in said original bill and cross-bill mentioned or to the marine insurance companies whose policies covered the cotton belonging to E. R. Robinson & Co., the Warren Manufacturing Company, and Foster & Nightingale, that then to the extent of such judgment or decrees as may be rendered against these cross-complainants they
541 have a judgment or decree over against the Merchants' Cotton Press & Storage Company; that the Merchants' Cotton Press & Storage Company be required to account to cross-complainants, as trustees, for any funds it has collected or ought to have collected in obedience to the above-mentioned decree of the supreme court of Tennessee, and that it be required to fully account for any sums of money in its hands applicable to the benefit and indemnity

of cross-complainants, as stipulated and provided in and by the said contract of May 24th, 1887, hereinabove mentioned and made part hereof, marked Exhibit "A."

And cross-complainants pray for any and all other relief which may be suitable and proper in the premises.

ANTHONY J. THOMAS &
542 CHAS. E. TRACY,
Receivers of the Cairo Division of the Wabash, St. Louis & Pacific Railway.
By ANTHONY J. THOMAS.
JOHN M. BUTLER,
Solicitor for Respondents and Cross-complainants.
ANTHONY J. THOMAS &
CHAS. E. TRACY,
As Receivers of Cairo, Vincennes & Chicago Line.

I hereby acknowledge myself to be surety for costs in behalf of cross-complainants Thomas & Tracy, and hereby agree to pay all costs property taxable against them herein.

JOHN M. BUTLER.

"EXHIBIT A."

This agreement is made and entered into on this 24th
543 day of May, A. D. 1887, between the Cairo & Vincennes Railroad Company, of Cairo, Illinois, by its receivers, Anthony J. Thomas and Chas. E. Tracy, hereinafter termed the party of the first part, and the Merchants' Cotton Press & Storage Company of Memphis, Tennessee, by its general manager H. A. Montgomery, hereinafter termed the party of the second part, and witnesseth as follows:

First. The party of the first part hereby agrees to give to the party of the second part, all cotton to compress that they carry out of Memphis compressed. The party of the second part bind themselves to properly and promptly compress all of said cotton, and shall insure the same for the benefit of the first party, and the price to be paid therefor by said first party shall be at the rate of
544 12½ (twelve and one-half) cents per one hundred (100) pounds, bill-of-lading weights for all cotton, so compressed on and prior to the 31st day of August, 1887, and ten (10) cents per one hundred pounds, bill-of-lading weights, for all cotton so compressed, etc., thereafter during the term of this agreement.

This compensation covers compressing and insurance, as well as the use of the second party's grounds, sheds, platforms, steamboat landings, and all other services rendered by said second party in and about such cotton delivered it hereunder, until the same is delivered, either in cars or to the steamboats to the first party by said second party.

Second. Such insurance shall be taken for the benefit of the first party, in good and solvent companies, so as to cover any loss
545 while such cotton is under the second party's control, and until delivered to the first party.

Third. The second party shall be liable for any loss arising from negligence or lack of care, in anywise to such cotton while under its control, agreeing to be bound therefor as a bailee for hire, and for any such loss shall pay the first party all damages and costs, or the first party may retain any dues to the second party to cover such loss. This, however, not to be limited to the amount of such dues.

Fourth. The first party hereby constitutes the second party its agent to receive such cotton for it, and sign receipts on which bills of lading may be issued, when cotton is delivered in their compresses on the grounds located at its river landings.

Fifth. So far as it can legally do so, the first party agrees
546 to establish no other compress agency, nor employ any other compress to do its compressing of cotton at Memphis, Tennessee, during the term of this contract.

Sixth. All bills for compressing cotton shall be paid weekly.

Seventh. This contract is to continue in force until the thirty-first day of August, 1896, said rate of twelve and one-half (12½ cents) cents per one hundred (100) pounds, being for one year from the 1st day of September, 1886, and said rate of ten (10) cents per one hundred (100) pounds for the remaining nine (9) years, and this contract is to relate back to first day of September, 1886, and is to cover, as to its terms, all compressing of cotton done by the second party for the first party since that date.

In witness whereof we have this day set our hands and seals.

ANTHONY J. THOMAS AND
547–549 CHAS. E. TRACY, *Receivers*,
By M. A. McDONALD, *G. M.*
MERCHANTS' COTTON PRESS & STORAGE COMPANY,
By H. A. MONTGOMERY, *G. M.*

* * * * * * *

550 *Order Approving Bond, &c. Entered Oct. 5th*, 1891.

THE INSURANCE COMPANY OF NORTH AMERICA OF PHILADELPHIA & *al.*
versus
THE DELAWARE MUTUAL SAFETY INSURANCE COMPANY & *al.*

In this cause, the Hon. L. H. Estes, judge of the circuit court of Shelby county, presiding by interchange, the regular chancellor being incompetent, the defendant- The Royal Insurance Company, The Continental Insurance Company, The Home Insurance Company of Louisiana, The Liverpool & London & Globe Insurance Company, and The National Fire Insurance Company presented to the court a petition for the removal of the cause to the circuit court of the United States for the western district of Tennessee,
551–560 of Memphis, which petition was filed in the clerk & master's office on the 5th day of September, 1891, and also a bond in the penalty and with the conditions prescribed by the act of

Congress in such cases, with T. B. Turley as surety, and moved the court for an order showing the acceptance of said bond, that no further proceedings would be had here in this court, and that the cause be adjudged removed to the said United States court according to the prayer of said petition; and thereupon the court finds and adjudges that the said bond is in proper form and the surety thereon sufficient, but now makes no further order in the premises, taking under advisement the question as to whether it will enter the order of removal and suspension as prayed for in the motion and in said petition.

561 *Petition for Removal.*

Filed Sept. 5, '91.

Your petitioners, The Royal Insurance Company, The Continental Insurance Company, The Fire Association, The Home Insurance Company of Louisiana, The Liverpool, London & Globe Insurance Co., and The National Fire Insurance Company, respectfully state and show unto the court that on the 7th day of August, 1891, The Insurance Company of North America, a corporation under the laws of the State of Pennsylvania; The Atlantic Mutual Insurance Company, a corporation under the laws of the State of New York; The Providence Washington Insurance Company, a corporation under the laws of the State of Rhode Island, filed their bill
562 in this honorable court against the Delaware Mutual Safety Insurance Company *et al.*

Among other defendants named in their bill were R. H. Deming and Jas. H. Foster, citizens of the State of Rhode Island and partners as R. H. Deming & Co., and The Phœnix Insurance Company, a corporation under the laws of the State of New York. On the 12th day of August, 1891, the said defendants filed in said cause a cross-bill against your petitioners and other codefendants in said cause named as defendants to said cross-bill.

Another defendant in said cause was The Cairo, Vincinnes & Chicago Line, a corporation under the laws of the State of Illinois, and Anthony J. Thomas & Chas. E. Tracey, receivers thereof, the last two named being citizens of the State of New York, but
563 being parties to said cause only in their capacity as such receivers.

And on the 7th day of August, 1891, the said defendants, The C., V. & C. Line and Anthony J. Thomas and Chas. E. Tracey, receivers thereof, and also the defendant The Delaware Mutual Safety Insurance Company, filed in said cause a cross-bill against your petitioners and other codefendants in said cause named as defendants in said cross-bill.

The Merchants' Cotton Press and Storage Co., a corporation under the laws of the State of Tennessee, was also made defendant to said cause.

Said bill was filed by said plaintiffs in their behalf and in behalf

of all other marine insurance companies that had issued
564 policies upon cottons destroyed by fire in a compress of said Merchants' Cotton Press & Storage Co., designated as the West Navy Yard compress, in the city of Memphis, Tennessee, by fire occurring on the 17th day of November, 1887, and that has paid said losses to their respective assured, which cottons were to be transported by and were covered by bills of lading of the Cairo, Vincinnes & Chicago line.

The plaintiffs, for themselves and other marine ins. companies in like situation, by said bill and cross-bill claim that the petitioners and other fire insurance companies, named as defendants to said bill, that had issued policies to the Merchants' Cotton Press &
565 Storage Company (said company being the assured therein) were liable to said Merchants' Cotton Press & Storage Co., as trustees for the said plaintiff and other marine companies standing in like situation with them for the full unpaid balance of the policies issued by each of the said fire insurance companies.

The said plaintiffs by said original bill and by said cross-bill also claim for themselves and other marine insurance companies in like situation that the said C., V. & C. line was and is liable to them respectively for the loss of each of said lots of cotton covered by its bills of lading; that the defendant The Merchants' Cotton Press & Storage Co. held and holds said fire insurance policies as indemnity to said plaintiffs, and the other marine insurance companies standing in like situation are entitled to enforce the alleged liability of petitioners and the other fire insurance companies therein
566 named as defendants for the indemnity directly of the C., V. & C. line and the payment, through said assured, by the destruction of said cotton by the fire aforesaid.

Petitioners state and show that the Merchants' Cotton Press & Storage Company is a citizen of the State of Tennessee; that the C., V. & C. line is a citizen of the State of Illinois, and that the petitioners are citizens and subjects of foreign States or of States other than the States of Tennessee & Illinois, and that the controversy is wholly between citizens of different States or between citizens of one or more of the several States and foreign citizens and subjects, and that the same can be fully determined as between them.

The Merchants' Cotton Press & Storage Company is the assured in policies issued by said fire insurance companies, and the
567 sole question, so far as concerns said fire insurance companies, is whether said Merchants' Cotton Press & Storage Co., a defendant upon the record, can recover against said fire insurance companies in behalf of the plaintiffs and others in like situation or in behalf of the C., V. & C. line. Petitioners further state and show that the amount in controversy as between the said plaintiffs and each of the petitioners exceeds the sum of $2,000, exclusive of interest & cost.

Petitioners file herewith a bond with good and sufficient surety, conditioned for the entering by them in the circuit court of the United States for the western district of Tennessee, on the first day of its next session, a copy of the records of this cause and for paying

all costs that may be awarded by said circuit court *its*
568–570 said court shall hold that such suit was wrongfully or improperly removed thereto.

Petitioners pray that this court will proceed no further with this cause, and that the same may be removed to the circuit court of the United States for the western district of Tennessee, sitting at Memphis, Tenn., as provided by the act of Congress in that behalf.

TURLEY AND WRIGHT AND
METCALFE AND WALKER,
For Petitioners.

571 THE INSURANCE COMPANY OF NORTH AMERICA OF PHILADELPHIA *et al.*
versus
THE DELAWARE MUTUAL SAFETY INSURANCE COMPANY *et al.*

Amended Petition for Removal.

NOV. 21, '91.

Your petitioners, The Royal Insurance Company, The Continental Insurance Company, The Fire Association, The Home Insurance Company of Louisiana, The Liverpool, London & Globe Insurance Company, and the National Fire Insurace Company, respectfully state and show unto the court that on the 7th day of August, 1891, The Insurance Company of North America, a corporation under the laws of the State of Pennsylvania; The Mutual Atlantic Insurance Company, a corporation under the laws of the State of New
572 York; The Providence Washington Insurance Company, a corporation under the laws of the State of Rhode Island, file their bill in this honorable court against The Delaware Mutual Safety Insurance Co. *et al.*

Among other defendants named in their bill were R. H. Deming and J. H. Foster, citizens of the State of Rhode Island and partners as R. H. Deming & Co., and The Phœnix Insurance Company, a corporation under the laws of the State of New York.

And on the 12th day of August, 1891, the said defendants filed in said cause a cross-bill against your petitioners and other codefendants in said cause named as defendants to said cross-bill.

Another defendant in said cause was The Cairo, Vincennes
573 and Chicago Line, a corporation under the laws of the State of Illinois, and Anthony J. Thomas and Chas. E. Tracy, receivers thereof, the last two named being citizens of the State of New York, but being parties to said cause only in their capacity as such receivers.

And on the 7th day of August, 1891, the said defendants, The C., V. & C. Line and Anthony J. Thomas and Chas. E. Tracy, receivers thereof, and also the defendant The Delaware Mutual Safety Insurance Co. filed in said causes cross-bill against your petitioners and other codefendants in said cause named as defendants in said cross-bill.

The Merchants' Cotton Press & Storage Company, a corporation

under the laws of the said State of Tennessee, was also made
574 defendant to said cause.

Said bill was filed by said plaintiffs in their behalf and in the behalf of all other marine insurance companies that *has* issued policies upon cottons destroyed by fire in a compress of said Merchants' Cotton Press & Storage Company, designated as the West Navy Yard compress, in the city of Memphis, Tenn., by a fire occurring on the 17th day of November, 1887, and that *has* paid losses to their respective assured, which cottons were to be transported and were covered by bills of lading of the Cairo, Vincennes & Chicago line.

The plaintiffs, for themselves and other marine insurance companies in like situation, by said bill and cross-bill claim that the petitioners and the other fire insurance companies named as de-
575 fendants to said bill that had issued policies to the said Merchants' Cotton Press and Storage Company (said company being assured therein) were liable to said Merchants' Cotton Press & Storage Co. as trustee for them, the said plaintiffs and other marine companies standing in like situation with them for the full unpaid balance of the policies issued by each of said fire insurance companies.

The said plaintiffs, by said original bill and by said cross-bills, also claim for themselves and other marine insurance companies in like situation that the said C., V. & C. line was and is liable to them respectively for the loss of each of said lots of cotton covered by its bill of lading; that the defendant The Merchants' Cotton Press & Storage Co. held and holds said fire insurance policies as indemnity to the said C., V. & C. line against that liability,
576 and that they, the said plaintiffs and the other marine insurance companies standing in like situation, are entitled to enforce the alleged liability of petitioners and the other fire insurance companies therein named as defendants for the indemnity directly of the C., V. & C. line and the payment through said C., V. & C. line of the losses accruing to their respective assured by the destruction of said cotton by the fire aforesaid.

Petitioners state & show that the Merchants' Cotton Press & Storage Co. is a citizen of the State of Tennessee; that the C., V. & C. line is a citizen of the State of Illinois, and that the petitioners are citizens and subjects of foreign States or of States other than the State of Tennessee or Illinois, the said Royal Insurance Company & the said London, Liverpool & Globe Insurance Com-
577 panies being citizens and subjects of Great Britain, the said Continental Insurance Company and said Fire Association being citizens of New York, the said Home Insurance Company being a citizen of Louisiana, and the said National Fire Insurance Company being a citizen of the State Connecticut, and that the controversy is wholly between citizens of different States or between citizens of one or more of the several States and foreign citizens and subjects, and that the same can be fully determined as between them.

The Merchants' Cotton Press & Storage Co. is the assured in the

policies issued by said fire insurance companies, and the sole question, so far as concerns said fire insurance companies, is
578 whether said Merchants' Cotton Press & Storage Co., a defendant upon the record, can recover against said fire insurance companies on their respective policies as set out in the bill of complaint in behalf of the plaintiffs and others in like situation or in behalf of the C., V & C. line.

Petitioners further state and show that the amount in the controversy as between the said plaintiffs and each of the petitioners exceeds the sum of two thousand dollars, exclusive of the interest and cost.

Petitioners file herewith a bond, with good and sufficient surety, conditioned for the entering by them in the circuit court of the United States for the western district of Tennessee, on the first day of its next session, a copy of the records of this case and for
579 paying all costs that may be awarded by said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto.

Petitioners pray that this court will proceed no further with this cause and that the same may be removed to the circuit court of the United States for the western district of Tennessee, sitting at Memphis, Tennessee, as provided by the act of Congress in that behalf.

TURLEY & WRIGHT AND
METCALF & WALKER,
For Petitioners.

Order as to Amended Petition. Entered Nov. 23rd, 1891.

In the Chancery Court of Shelby County, Tennessee.

580 THE INSURANCE COMPANY OF NORTH AMERICA *et al.*
versus
THE DELAWARE MUTUAL SAFETY INSURANCE COMPANY *et al.*
No. 7994.

In the above-entitled cause the petition filed for removal on the 5th day of September, 1891, by the Royal Insurance Company *et al.* is by leave of court and for satisfactory reasons appearing to the court, the Hon. L. H. Estes sitting by interchange because of the incompetency of the chancellor, amended as follows, to wit: By inserting after the words "States of Tennessee or Illinois" on the 20th line of the 3rd page of said petition the following, to wit: The said Royal Insurance Company and the said London & Liverpool & Globe Insurance Companies being citizens & subjects of Great Britain, and the said Continental Insurance Company and
581 the said fire associations being citizens of New York, and the said Home Insurance Company being a citizen of Louisiana, and the said National Fire Insurance Company being a citizen of the State of Connecticut," and the same is further amended by inserting in the third line from the bottom of said 3rd page the following quo-

tation "on their respective policies as set out in the bill of complaint." The petitioners at the time of the passing of this order filed the petition amended as aforesaid in order to show the entire reading of said petition as amended. The foregoing order having been passed on Friday, the 20th inst., is entered now as of that date.

582 *Answer and Cross-bill of the Marine Ins. Co., Limited, of London.*

Filed 10th day of December, 1891.

In the Chancery Court of Shelby County, Tennessee.

THE INSURANCE COMPANY OF NORTH AMERICA OF PHILADELPHIA and Others *vs.* DELAWARE MUTUAL SAFETY ASSURANCE COMPANY and Others.	7994, R. D. Original and Amended Bills.
DELAWARE MUTUAL SAFETY ASSURANCE COMPANY and A. J. THOMAS and C. E. TRACEY, Receivers, *vs.* THE INSURANCE COMPANY OF NORTH AMERICA OF PHILADELPHIA and Others.	Cross-bill.
RICHARD HENRY DEMING and Others, Composing the Firm of R. H. Deming & Co., for the Use of The Phœnix Insurance Company and Others, *vs.* THE DELAWARE SAFETY ASSURANCE COMPANY.	Cross-bill.
A. J. THOMAS and CHAS. E. TRACEY, Receivers, etc., and Others *vs.* INSURANCE COMPANY OF NORTH AMERICA OF PHILADELHIA and Others.	Cross-bill.

583

584 The sole and separate answer of "The Marine Insurance Company of London, England," and one of the defendants herein, to the original, amended, and cross bills aforesaid.

This respondent, saving and reserving unto itself the benefit of all exceptions and objections to said bills, for answer thereto or to the material parts thereof, answering, says:

It admits and shows that it had policies of insurance for the protection of certain of its patrons who had cotton destroyed in the compress fire mentioned in the bills aforesaid; that among other cotton destroyed the Warren Manufacturing Company, a corporation duly chartered and organized under the laws of Rhode Island, with its situs at Warren, in said State, was the owner of five
585 hundred and five (505) bales of cotton destroyed in said fire; that Foster & Nightingale, a firm composed of L. T. Foster

and J. K. H. Nightingale, of Providence, Rhode Island, *was* the owner of one hundred (100) other bales; that the value of the five hundred and five bales (505) owned by the Warren Mfg. Co. was about twenty-six thousand ($26,000) dollars, and the value of the one hundred (100) bales owned by Foster & Nightingale was about fifty-five hundred ($5,500.00) dollars; that all of said cotton was under the bills of lading of the Cairo, Vincennes & Chicago line at the time of its loss in said fire, and respondents herewith file copies of the several bills of lading under which said cotton was held at the time of loss and asks that they may be taken as parts of its answer and made Exhibits Nos. 1, 2, 3, 4, & 5, the original
586 bills of lading being on file in the chancery court of Shelby county, Tenn., in the case of Jones Bros. & Co. *et al.* against The Merchants' Cotton Press & Storage Co. *et al.*, 6878, R. D.

Respondents, further answering, would show that the bills of lading aforesaid contained no clause which would exempt the said Cairo, Vincennes & Chicago line from liability for loss by fire while in the sheds of the compress Co. and under the circumstances accompanying the fire which destroyed the cotton last hereinbefore mentioned.

That the only clause or clauses in said bill of lading upon which a claim of exemption can be founded by the carrier was as follows: That the Cairo, Vincennes & Chicago line and forwarding lines with which it connects and which received said property shall not
587 be liable for leakage of oils or any other kinds of *of* liquids, breakage of any kind of glass, earthen or queensware, carboys of acids, or articles packed in glass, store furniture, castings, machinery, carriages, furniture, musical instruments of any kind, packages of eggs, or for rust of iron and iron articles, or for loss or damage by wet, dirt, fire, or for loss of weight, or for condition of bailing of hay, hemp, or cotton, or for loss or damage of any kind of articles whose bulk requires it to be carried on open cars; nor for damag*i* to perishable property of any kind occasioned by delays from any cause or by change of weather; nor for loss or damage to any article or property whatever by fire or other casualty while in transit or while in depots or other places of trans-hipment or at depots or landings at point of delivery; nor for loss or damage by fire, collision, or the dangers of navigation while
588 on the seas, rivers, lakes, or canals;" and respondent herewith files a copy of said bills of lading and makes the same Exhibit # 1 to this answer and cross-bill, and refers to the orignals on file in case # 6878, R. D., in this court as aforesaid for the original bills of lading covering the shipment of all cotton hereinbefore mentioned.

This respondent, further answering, would show & charge that the language of the bills of lading aforesaid is not sufficient in form or meaning to exempt that railroad company from responsibility by loss of said cotton by fire while it was in the compress sheds as aforesaid, same being at the time of its loss under the protection of said bills of lading, and submits the construction of these bills of

lading to the court. It also shows and charges that even if
589 the language of the exemption in said bills of lading was sufficient to cover such a loss that there was no proper or sufficient consideration given by said carrier to the shipper and owner for the allowance of such exemption. It likewise shows and charges that by reason of the destruction of the cotton aforesaid the same was never delivered at its destination, and said cotton having been destroyed by a peril for which respondent was held to be practically liable by the supreme court of Tennessee and was likewise held to have paid the amount of said -- to its said assured, this respondent submits and charges that by these facts it became subrogated to all the rights of the shipper and owner of said cotton against said carrier.

Respondent, further answering, would show and charge that all cotton aforesaid was originally deposited in the compress
590 sheds of said Merchants' Cotton Press and Storage Co. under its contract and agreement that all said cotton should be covered by it with insurance while it remained in its sheds and until loaded onto the common carrier's vehicles of transportation; that said compress Co. held insurance in various companies on the respective lots of cotton destroyed by said fire to an aggregate amount of about ($300,000.00) three hundred thousand dollars, as stated fully in the pleadings; that the fire insurance Co's concerned in the policies taken by the compress Co. are liable to their insurers according to their contract of insurance, and that the compress Co. as trustee or agents of the carriers and owners is bound by its contracts to collect said insurance and appropriate its benefits accord-
591 ing to the rights of the respective parties.

This respondent, further answering, denies all allegations in original, amended, and cross bills herein not heretofore admitted or denies, and now, having fully answered prays to be hence dismissed with *their* costs.

But to the end that the rights of all parties who have or may become interested in the fire insurance held by the compress Co. on said cotton as aforesaid may be finally adjudicated and adjusted, this respondent prays that this its answer may be taken as a cross-bill against said Merchants' Cotton Press & Storage Co., the said Cairo, Vincennes & Chicago line, its receivers, Anthony J. Thomas and Chas. E. Tracy, and the fire insurance companies whose
592 policies on said cotton were held by said compress company at the time of the fire aforesaid and whose names are set forth at large on page six of the original bill may be made parties defendant to this cross-bill; that process duly issue or publication be made for said defendants in accordance with the practice of this court, requiring them to appear herein at some early rule day to be designated by the clerk and master and answer the allegations of this bill, but they need not answer under oath, as their oaths are hereby expressly waived.

That all proper interlocutory orders and decrees be made, and that upon the final hearing this cross-complainant hav*ing* such decrees against the defendants and especially against the Cairo,

Vincennes & Chicago line and its receivers as *they* may
593–601 be entitled to have declared in *their* favor, and that it may have appropriated to such recovery a proper porportionate share of the fire insurance held by the compress Co. on said cotton as it may be entitled to receive under all the facts of the case.

It also prays for such other and further general or special relief as it may be entitled to in the premises.

H. C. WARRINER,
Sols. for Defendant and Cross-compl't, The Marine Insurance Co., Limited, of London, Eng., Def't & Cross-compl't.

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602 *Answer and Cross-bill of British & Foreign Marine Insurance Co., Limited, of Liverpool. Filed December 10th, 1891.*

The sole and separate answer of The British and Foreign Marine Insurance Company, Limited, of Liverpool, England, and one of the defendants herein, to the original, amended, and cross bills aforesaid.

This respondent, saving and reserving unto itself the benefit of all exceptions and objections to said bills, for answer thereto or to the material parts thereof, answering, says:

It admits and shows that it had a policy of insurance for the protection of E. R. Robertson & Co., of the city of New York, on a small lot of cotton, to wit, about (23) twenty-three bales, *to* the value of eighteen hundred ($1,800) dollars, which cotton was de-
603 stroyed in the compress fire mentioned in the bills aforesaid.

That at the time of said loss the twenty-three (23) bales of cotton aforesaid were in the compress sheds of the Merchants' Cotton Press & Storage Co., where it had been deposited with the agreement and understanding that the same should be covered by it with fire insurance from the time of its said deposit until it was loaded on the common carrier's vehicles of transportation; that said cotton was also at the time of its loss under the bills of lading of the Cairo, Vincennes & Chicago line, and said cotton was legally in the possession of said line under its said bills of lading, a copy of one of which is herewith filed and asked to be taken as a part of this answer and marked Exhibit "1," and the originals of all which will be found on file in this court in the case of Jones
604 Bros. & Co. *et al. vs.* Merchants' Cotton Press and Storage Co. *et al.*, "6878, R. D.

This respondent, further answering, would show and charge that not only was said compress — liable for said loss, but the Cairo, Vincennes and Chicago line and A. J. Thomas and C. E. Tracy, its receivers, were also liable for said loss, it having occurred after said cotton had passed under its control and legal possession under its aforesaid bills of lading; that said bills of lading contained no clause which would exempt said common carrier or its receivers

from *from* liability for the loss of said cotton by fire while deposited in the sheds of said compress Co. under the circumstances accompanying the fire as detailed in the other pleadings herein; that the only clause in said bill of lading under which such a claim of
605 exemption can be possibly set up is as follows, to wit: "That the Cairo, Vincennes & Chicago line and forwarding lines with which it connects, and which receive said property, shall not be liable for leakage of oils or any other kind of liquid; breakage of any kind of glass, earthenware, or queehsware, carboys of acids or articles packed in glass; stoves, stove furniture, castings, machinery, carriages, furniture, musical instruments of any kind; packages of eggs, or for rust of iron and iron articles, or for loss or damage by wet, dirt, fire, or for loss of weight, or for condition of baling of hay, hemp or cotton; or for loss or damage of any kind of article-, whose bulk requires it to be carried on open cars; nor for damage to perishable property of any kind occasioned by delays from any cause, or by change of weather; nor for loss or damage to any ar-
606 ticle or property whatever, by fire or other casualty while in transit or while in the depots or other places of trans-hipment, or at depots or landing at point of delivery; nor for loss or damage by fire, collision, or the dangers of navigation while on the seas, rivers, lakes, or canals."

But this respondent submits that the stipulations of said bills of lading in form & language are insufficient for the purposes of exemption claimed by the carrier, and it likewise submits that even if the language of said bills of lading justified a construction that would exempt the common carrier from a loss by fire while said cotton was in the compress sheds, then such an exemption was not only unjust and unreasonable, but was not supported by a sufficient legal consideration.

607 Respondent, further answering, would show that said compress Co., in partial performance of its undertaking to fully cover said cotton by insurance while in its presses, had held policies of fire insurance on all the cotton destroyed in said fire, including the twenty-three (23) bales aforesaid, which fire insurance aggregated about three hundred thousand ($300,000.00) dollars, under various policies issued by the several fire insurance Co's enumerated on page six of the original bill, the said policies for fire insurance having been taken out by the compress Co. as agent of the carriers, transport line, and owners of said cotton.

This respondent, further answering, would show that the Cairo, Vincennes & Chicago line had its own contract in writing
608 with the compress Co., by the terms of which the obligations of the latter company to cover by fire insurance was specifically declared and the proper construction of which under the facts of this case as detailed in the pleadings will make the compress Co. and said fire insurance companies answerable over to the common carrier for any liability which may be adjudged against the latter in favor of this respondent in this cause.

Respondent, further answering, would show that the cotton aforesaid was destroyed by a peril for which it had been practically held

liable to its insured by the supreme court of Tennessee, and it has likewise been held by the same court to have paid said loss to its assured, E. R. Robertson & Co., and respondent submits and charges that by reason of these facts it has become subrogated to the
609 rights of the owner of said cotton against said common carrier and against all others who may be under legal obligations to indemnify said common carrier against such.

Respondent here denies all other facts in said bills not heretofore admitted or denied, and now, having fully answered, it prays to be hence dismissed with its cost.

But to the end that the rights of all parties who may or have become interested in the fire insurance held by the compress company on said cotton may be finally adjudicated — adjusted, this respondent prays that this its answer may be taken as a cross-bill against said Merchants' Cotton Press & Storage Co. and the said Cairo, Vincennes & Chicago line, its receivers, A. J. Thomas and C. E. Tracy, and the several fire insurance companies whose
610 policies on said cotton were held by said compress Co. at the time of the fire aforesaid and whose names are set forth at large on page six of the original bill may be made parties defendant to this cross-bill.

That process duly issue or publication be made for said defendants in accordance with the practice of this court, requiring them to appear herein at some early day to be designated by the clerk & master and answer the allegations of this cross-bill, but they need not answer under oath as their answers under oath are hereby expressly waived; that all proper interlocutory orders and decrees be made, and that upon a final hearing this cross-complainant have a decree against the Cairo, Vincennes & Chicago line and its receivers for the value of said cotton, and that it likewise have
611–627 such decrees against the fire insurance companies aforesaid and against said compress Co. as it may be entitled to have under all the facts set forth in the pleadings.

Respondent prays for such other or further general and special relief as it may be entitled to receive.

H. C. WARRINER,
Sol. for Def't & X Compl't British and Foreign Marine Insurance Company, Limited, of Liverpool, England.

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628 *Order on Petition to Remove. Entered Dec.* 18, '91.

THE INSURANCE COMPANY OF NORTH AMERICA OF PHILADELPHIA *et al.*
versus
629 THE DELAWARE MUTUAL SAFETY INSURANCE COMPANY *et al.*

This cause was heard before the Hon. L. H. Estes, sitting by interchange with the Hon. Wm. D. Beard, upon the petition and

amended petition of the Royal Insurance Company, the Liverpool, London & Globe Insurance Company, the Continental Insurance Company, and the National Insurance Company and the Home Insurance Company of Louisiana for an order to remove this suit from the chancery court of Shelby county, Tennessee, into the circuit court of the United States for the western district of Tennessee, at Memphis, and after hearing Mr. S. P. Walker and Mr. T. B. Turley on behalf of the motion and Mr. W. H. Carroll in opposition thereto, after full consideration had the court is of opinion
630 that the suit is not removable under the act of Congress, either as a controversy wholly between citizens of different States or as involving a controversy therein between the petitioning defendants and any one or more of the plaintiffs or parties who can be rearranged in the record as plaintiffs, and doth accordingly refuse to grant an order of removal.

Wherefore the court is now pleased to order and adjudge that the cause proceed in the chancery court aforesaid, the parties being at liberty to take such steps therein as they may be advised are requisite and necessary in order to have the cause finally heard and disposed of.

The said petitioners except to the ruling of the court refusing to recognize the removal of the cause and to grant a stay of proceedings, and object to the further proceeding of the cause in
631 this court, and they are now allowed to put their exceptions and objection of record as a standing exception and objection to each and every further step that may be taken herein without the necessity of repeating the same as each such further step may be taken.

Answer and Demurrer and Cross-bill of N. N. & M. V. Co.

Filed 31st day of Dec., 1891.

THE INSURANCE COMPANY OF NORTH AMERICA and Others, Complainants,
v.
THE DELAWARE MUTUAL SAFETY INSURANCE COMPANY *et al.*, Defendants. } #7994.

In this cause the Newport News & Mississippi Valley Com-
632 pany comes and demurs to so much and such parts of the cross-bill herein filed by Anthony J. Thomas and Chas. E. Tracy, as receivers of the Cairo division of the Wabash, St. Louis & Pacific R'y Co., known as the Cairo, Vincennes & Chicago line, as makes this demurrant party thereto, and avers any matter or transaction as effecting it, and for cause of demurrer states and shows:

1st. That herein said cross-complainants neither allege any liability on the part of this demurrant, nor do they ask for any relief as against it: wherefore the said N. N. & M. V. Co. asks a judgment of the court whether it is bound thereon to make any other or further defence of this case, and shows that the same should be dismissed.

2nd. And said Newport News and Mississippi Valley Co., for answer to the amended bill filed herein by the said original complainants, The Insurance Company of North America and others, as well as for answer to the cross-bill filed herein by R. H. Deming and James Herbert Foster, trading under the name of R. H. Deming & Co., and the Phœnix Insurance Company, answering, states and shows that no part of said 948 bales of cotton in the said pleadings described as having been placed in the said compress of the defendant Merchants' Cotton Press and Storage Company under so-called permits from this respondent were ever in the hands, custody, or control of this respondent or of any agent for it, and were never in its possession, actually or constructively, nor did it ever have any right to the possession thereof nor to take the same or to carry the same from the complainants or other person or persons, and each and every averment to the contrary in the said amended bill and cross-bill is denied.

3rd. The said Newport News & Mississippi Valley Co., for further answer, states and shows that said 948 bales of cotton were placed in the said press of its codefendant by Jones Bros. & Co. for their own account, and they took from said compress company its warehouse receipts therefor, without possession of which said cotton could not be taken by any one from said compress; that thereafter said Jones & Co. delivered said warehouse receipts for said 948 bales of cotton to L. L. Fellows, agent of the receivers of the C., V. & C. line, and took a bill of lading of that line therefor, specifying that said cottons were to be transported by it by river from Memphis to Cairo and thence by their C., V. & C. line and its connections to the Eastern seaboard. This respondent had no custody or control thereof and never received from either said Jones Bros. & Co. or said L. L. Fellows or other person the said cottons or any right or control thereof or had any directions with regard to the transportation thereof, and each and every averment to the contrary of this is denied by this respondent.

4th. Respondent sets up and alleges that said 948 bales of cotton were held in the compress at and prior to the destruction thereof for and on account of the said C., V. & C. line and under the directions of the said L. L. Fellows, as its agent, and no shipping directions were given to the said compress Co. or any agent thereof by said Fellows at any time prior to the destruction thereof by fire, as set forth in the pleadings nor for its delivery to this respondent or to any person for its account. As shown in the deposition of said L. L. Fellows referred to in the pleadings above and as specially set forth in the answers of said Fellows to questions 73, 74, 75, 76, and 77, his company, the said receivers of the C., V. & C. line, still hold the warehouse receipts of the compress Co. for said 948 bales of cotton, have never surrendered same to the compress Co., and never gave it any directions for shipment out over this respondent's line or otherwise. This deposition was taken and filed in the case of R. H. Deming & Co. and others, referred to in the pleadings above as filed in this court and determined in the supreme court of Tennessee at its April term, 1891, and, as set

forth and stated in said answers by said Fellows, said cottons were never directed to be shipped by him over any line other than river steamboats out of Memphis to Cairo, and the steps necessary for even that shipment were never consummated by surrender by him to compress Co. of its press receipts therefor.

This respondent never had from said Fellows any authority whatever for taking said cottons from the compress Co., nor was it at any time clothed with any power whatever for demanding same, either given it by said Jones & Co. or said Fellows or any other person acting for the owners or carriers. Neither was there any contract made for the transportation by said W. R. McIntosh or
638 any other person acting as agent for this respondent farther than to quote the rates at which this respondent would transport same over its own line. Said cottons, as above stated, never came to this respondent's possession in any way, fashion, or form. The said press in which same had been placed by said Jones Bros. & Co., and in which same were when burned, was the press used by the said compress Co. not only for this respondents, as stated in the pleadings, but was the press used largely (and much more largely) for cottons to be shipped by river than for cottons to be shipped over respondent's road, and other cottons than those to be transported by either of these routes *was* also stored there and burned there.

As adjudged by the supreme court of Tennessee in the said Deming case and in the Lancaster mills case, the issuing of a
639 permit by respondent to the said Jones Bros. & Co. for placing said cottons in said press clothed respondent with no power or right of control thereof and charged it with no duty whatever thereabouts, except or unless the depositors should bring to respondents the press receipts and exchange said — with respondents for its b. l., thereby clothing respondent with right of possession or the right to demand same from the compress Co. This was never done with regard to said 948 b. c. or any part thereof; but, on the contrary, as above stated, Jones Bros. & Co. took b. l. for said 948 bales of cotton from said Fellows as agent for the C., V. & C. line or said Thomas and Tracy, receivers thereof, routing the same by river to Cairo, and while it may be true that on or about the time of the said fire it was decided by said Fellows to
640 change the routing of said cottons from the river to respondent's line, yet that, as stated by said Fellows in his deposition above, was never consummated, and the cottons were never delivered to respondent nor was it ever given any right to demand or receive same nor was it charged with any duty in these respects.

5th. This respondent, for further answer, denies that it is under any liability whatever to complainants or cross-complainants because of any of the matters set forth and stated in their bill; denies that it was ever in possession of said cottons or any part thereof or charged with any duty thereabouts.

6th. It is true, as alleged in the pleadings, that respondent had a contract with its codefendant, The Merchants' Cotton Press & Storage Co., stipulating on behalf of the latter for the safe keeping,

compression, insurance, and loading of cottons that might
641 be sent it by respondent for shipment over its line, and it files herewith and makes same a part of its answer to all intents and purposes a copy of said contract. It is also true that under said contract with said compress Co. it bound itself to carry insurance on all cottons it might at any time hold for account of this respondent, insuring the same in good and solvent companies for the full value thereof for indemnity or protection of the depositor against its liability, if any, as carrier because thereof. It is also true that its codefendant, the said Merchants' Cotton Press and Storage Co., failed to perform its obligations in respect of said insurance, in that instead of insuring the cottons in said press at the time of said fire up to their full value, to wit, $700,000, it only held thereon insurance to the amount of about $301,500, and
642 of this, as respondent is informed and believes, only about $185,300 was placed in good and solvent companies authorized to do business in Tennessee under its insurance laws.

And, as respondent is advised and believes, its codefendant, The Merchants' Cotton Press & Storage Co., is liable to it for the benefit of the owners of such cottons as were destroyed in said press for which respondent was liable to owners as carrier thereof, both for the value of such cottons for which said compress company had failed to take out insurance as well as for the value thereof for which it effected insurance other than in good and solvent companies.

And, having thus answered in full the allegations of said bill as amended and said cross-bill as far as it is advised that it is material that it should do so, respondent prays that this answer may
643 also be taken as its cross-bill against the said Merchants' Cotton Press & Storage Company, and that to the end that in case respondent may, notwithstanding the matters hereinabove set forth, be adjudged liable to complainants or cross-complainants for the value of said 948 bales of cotton, then that it may recover over against said Merchants' Cotton Press & Storage Company on account of its agreement to insure such cottons the value thereof, with interest, etc. This both as to insurance effected and as to whatever it may have failed of full insurance, and also for invalid, no good, insolvent, or improper insurance.

And for this purpose respondent avers that by virtue of said contract made with it by said Merchants' Cotton Press & Storage Company the latter was obligated to fully insure said cottons in
644 good and solvent companies for respondent's benefit; that it failed so to do and only partially insured the same; that a large number of the policies it did take out were in companies not authorized to do such business in this State, and many or all of which are and for a long time have been insolvent; that said Merchants' Cotton Press & Storage Company has utterly failed and refused to collect such insurance moneys and has made common cause with its insurers to hinder, delay, and defeat the collection of such insurance moneys, and has refused to collect the same until many of such insurance companies have become and are insolvent;

that said Merchants' Cotton Press & Storage Company is liable both for what of the value of such cotton it failed to cover with insurance and for such insurance as it effected in companies
645–647 not authorized to do business in Tennessee or were or are insolvent and for not having collected same by suit, etc.

Respondent in this behalf prays for copy and subpœna to issue for proper decrees against said Merchants' Cotton Press & Storage Company for the value of said cottons, so far as not insured or not insured in companies authorized to do such business in this State or not good and solvent or from which it has not sued for or enforced payment, and for all such other, further, different, and general relief as if the nature of the premises it may have and be entitled to, etc.

HOLMES CUMMINS,
Sols. for N. N. & M. V. Co.

I am surety for N. N. & M. V. Co. on cost bond on this cross-bill.

HOLMES CUMMINS.

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648 *Answer and Demurrer of M. C. P. & S. Co., N. Hill, T. H. Allen, Jr., and S. R. Montgomery.*

Filed 31st day of Dec., 1891.

Defendants, The Merchants' Cotton Press & Storage Company, Napoleon Hill, Thos. H. Allen, Jr., and S. R. Montgomery, for answer to the original, amended, and cross-bill filed against them and others in the above-entitled causes, say:

1.

They admit that by a fire occurring on the 17th day of November, 1887, in one of the presses of the Merchants' Cotton Press & Storage Company, located in the old navy-yard grounds and known as the West Navy-yard press, there was destroyed by fire about fourteen thousand bales of cotton, then in the custody of the said Merchants' Cotton Press & Storage Company. The ex-
649 act amount so destroyed was thirteen thousand eight hundred and eighty-eight bales.

2.

They admit that of the cottons thus destroyed by fire 5,087 bales, of the value of $245,735.40, were covered by the bills of lading of the Cairo, Vincennes and Chicago line.

3.

They deny that the said Cairo, Vincennes & Chicago line is liable to the owners of said cottons for the loss thereof.

They say that said C., V. & C. line is not liable for such loss, for the reasons that the consignors, by a special stipulation written or

stamped on the face of the bills of lading and accepted by them, assumed the fire risk until the cotton should be landed at Cairo, Ill., and for the further reason that the said C., V. & C. line was
650 exempt from a loss by fire under the general terms of its bills of lading. Said bills of lading are filed or proposed to be filed by the complainants herein and respondents will rely upon the same as avoiding any liability on the part of the said C., V. & C. line for a loss by fire, the said cotton, &c., having been lost by the negligence of said C., V. & C. line, its agents, servants, or employees.

They deny that the exemption from liability, as contained in the said bill of lading, does not apply to a loss by fire whilst the cottons were in a compress. They say, on the contrary, that the language of the bills of lading is in itself broad enough to cover such loss, and that the facts and circumstances attending and the time at which the bills of lading were issued make the fire-exemption
651 clause as therein contained peculiarly and specially applicable to loss by a fire whilst the cottons were in a compress.

The facts material to this point are—

1st. That the carrier did not receive and would not have received any compensation or consideration whatever for the assumption of any liability in respect of said cottons before the actual delivery thereof to said carrier. The cottons were only constructively delivered to said carrier, the actual delivery being to the Merchants' Cotton Press & Storage Company. Upon delivery to the last-named company its press receipts were executed and delivered to the shipper, and thereafter the shipper delivered the same to the agent of the carrier and took a bill of lading therefor. The cottons
652 were delivered uncompressed, with the privilege to the carrier of compressing, the carrier to pay the cost of compressing, to wit, ten cents per hundred pounds, and including the same in the rate of freight fixed in the bill of lading. For example, the bill of lading for one hundred and fifty bales of cotton consigned to the Schore mills, at Fall River, Mass., filed as the first bill of lading exhibited with the bill, shows a rate of freight of fifty-three and a half cents per hundred pounds. The real rate of freight was forty-three and a half cents per hundred pounds, ten cents being added thereto to cover the cost of compressing and other services to be rendered by the compress Co. The ten cents per hundred pounds thus included in the rate of freight and to have been collected by the carrier from the shipper would, when collected from the shipper by the carrier, have been paid over to the compress
653 company for its services of compressing, etc. The carrier was the mere medium of collecting and paying over the amount necessary to be paid for compressing, etc., and it received no consideration whatever for any assumption of liability whilst the cottons were in the press.

2nd. The bills of lading were issued by the carriers, whilst the cotton yet remained in the press and before actual delivery to the carriers, at the instance and request and for the convenience and advantage of the shipper. It was necessary that the shipper should get

his bill of lading as promptly as possible in order to enable him to draw against the shipment and get the draft discounted at one of the banks to put him in funds with which to pay the factor from whom the cotton was bought therefor. The great body of
654 shippers were unable to pay for the cotton bought by them otherwise than by checking against the proceeds of the drafts to be drawn against the shipments. The banks would not discount such drafts unless they were attached to and accompanied by the bill of lading as security for the ultimate payment thereof by the drawee. To meet this necessity and enable the shipper to get his bill of lading as promptly as possible the carriers generally entered into contracts with the compress company in terms substantially like that referred to in the bill of complaint between it and the receivers of the C., V. & C. line, and undertook generally and did customarily issue their bills of lading upon the surrender to them of the press receipts. The compress company, as respondents are advised, became from the time the bill of lading issued until
655 the loading on the cars should occur the bailee of the carrier, the shipper holding and looking only to the bill of lading issued by the carriers.

This system and course of business was universally adopted and acted upon by the shippers and carriers at and for several years before the said fire of Nov. 17th, 1887. As already stated, it was adopted mainly for the convenience and advantage of the shipper, to enable him to get his bill of lading without the actual compression and delivery of the cottons to the carrier.

3rd. As already determined by the supreme court of Louisiana in the cases of The Lancaster Mills *vs.* The Merchants' Cotton Press and Storage Co. and Deming & Co. *vs.* The Merchants' Cotton Press and Storage Co., the contract between the compress company
656 and the carriers obligated the former to insure and the fire policies actually taken out by it did insure the owner's interest in said cotton as well as the carrier's liability therefor, so that the owner was fully protected without resorting to the liability of the carrier or to insurance carried by himself.

4th. It is true that the cottons were delivered by the shipper uncompressed, but it is also true that either by the express terms of the bill of lading or by agreement collateral thereto between the shipper and carrier it was universally provided that the cotton should be compressed before shipment.

The cottons were delivered by the shipper himself to the compress company with the distinct understanding and agreement that they would be compressed before shipment. It is true now
657 and was true at the time of said fire of Nov. 17th, 1887, and — been the case for many years anterior thereto that all cottons going out of Memphis to foreign, eastern, & northeastern points were carried compressed. The compression reduced the bulk of cotton by at least one-half and enabled the carrier to give a much lower rate of freight than would have been otherwise possible. Such compression was mainly to the advantage of the shipper.

It is also true that the consignees, including the consignees whose

rights are here involved, knew that the bills of lading were customarily issued upon the press receipts, and that the cottons would remain in the compress for the purpose of compression. This course of business had been so long prevalent that it was generally known not only to the consignors but to the consignees. It was,
658 in fact, known to the consignors and consignees whose rights are here involved.

Respondents supposed it to be true that the hazard of fire in a compress was greater than during transportation; but it is also true that the hazard would have remained wholly with and upon the consignor except for the fact that the carrier, without any obligation to do so, at the instance and for the benefit af the shipper, issued its bill of lading upon the cottons whilst they yet remained in the press.

Construed in the light of all the attending circumstances, respondents deny the allegations of the bill to the effect that the fire-exemption clause, as contained in the bills of lading of the C., 659 V. & C. line, did not reply to a loss by fire of cottons while in a compress.

Respondents admit that of the cottons so destroyed by fire the fifty bales consigned and belonging to Hooper and Buffiington and one hundred bales consigned and belonging to E. H. Coates and Co. were covered by bills of lading of the C., V. & C. line, and that the supreme court of Tennessee, under its decree in said cases of Deming & Co., rendered judgment against the compress company and the fire insurance companies in which it held policies for the full value of the said cottons, and that in computing the amount of the fire-insurance fund to be reserved as indemnity to the holders of bills of lading of the C., V. & C. line the said cottons were not included.

5.

660 Respondents admit the execution of the contract dated May 24th, 1887, between the Merchants' Cotton Press and Storage Co. and the C., V. & C. line, as averred in the bill, but reserve the right to produce the original of said contract and to correct any inaccuracies in the copy, as set out in the bill, if any such there be.

Respondents do not admit the validity of said contract, nor do they admit the averments of the bill in respect of the construction or legal effect thereof or in respect of the objects or motives of the parties thereto making the same.

Respondents are advised that the said contract if not binding on both parties is not binding on either.

They are advised that the said Thomas and Tracy, as receivers of the C., V. & C. line, had no authority whatever to locate 661 an agent in the city of Memphis with power to make the contracts of affreightment evidenced by the bills of lading exhibited with the bill of compaint: that said alleged contracts of affreightment are void, and that all the acts of the said Thomas & Tracy in the premises, including the execution of said contract with respondent compress company of date May 24th, 1887, are *ultra vires* and void.

4th.

It is true that at the time of said fire respondent The Merchants' Cotton Press and Storage Co. held policies of insurance covering the cottons in said press in the various companies named in the bill, the number of each policy, its amount, and the residence
662 or domicile of the company issuing the same being correctly set forth in the bill.

The policies themselves are on file in the chancery court of Shelby county in the cases growing out of the said loss by fire on Nov. 17th, 1887, and heretofore determined in that court and in the supreme court of the State on appeal. The contents thereof will best appear from the policies themselves, which respondents will produce at the hearing.

Respondents believe it to be true that it was the purpose of the C., V. & C. line and its receivers and of respondent The Merchants' Cotton Press and Storage Co. by said insurance to indemnify the C., V. & C. line against any liability for a loss by fire whilst in the press of cottons covered by its bills of lading, and that it was intended that the indemnity thus to be provided should be pri-
663 mary to the liability of the C., V. & C. line; but respondents are advised that these questions of purpose and intent on the part of the contracting parties will be determined by the court upon the face of the contract and the surrounding circumstances, which may be competently looked to in determining that question, and respondents leave its determination in that mode to the court.

7.

It is true that after the said loss by fire the fire insurance companies in which said Merchants' Cotton Press & Storage Company held policies as aforesaid admitted their liability to the amount necessary to pay those depositors of the cotton who held no bills of lading and who had no other insurance. The value of the cottons in that category was, as stated in the bill, $52,472.26, which
664 sum was paid by the said fire insurance companies to the compress company, and was by it paid over to the owners of said cottons.

It is not true, as averred in the bill, that the respondent compress company wrongfully paid over said fund to the owners of such cottons. The fact is that the insurance companies paid over said fund to said compress company specifically for those owners, and that the act of payment to said owners was that of the fire insurance companies and not that of the respondent compress company, the said fire insurance companies adjusting the losses on those lots of cotton and paying over the money for the owners thereof, making the respondents the compress company a mere medium of payment.

In respect to the averment of the bill as to the adjudica-
665 tion of the supreme court of Tennessee as to the said fund of $52,472.26, and in respect to the other allegations of the bill as to the points adjudged in the supreme court of Tennessee,

respondents here, once for all, file a copy of said decree of the supreme court of Tennessee. Its contents will best appear from an inspection thereof. Whether the same is and to what extent, if any, it is binding as *res judicata* in the present case the court will determine from an inspection of the records of the cases in which said decrees were pronounced, and these —.

8.

Respondents have no personal knowledge that complainants The Insurance Company of North America of Philadelphia, The Atlantic Mutual Insurance Company, The Providence Washington
666 Insurance Company, and the various marine insurance companies named as defendants to the bill issued marine policies to the various owners of the cottons destroyed by said fire, as alleged in the bill. They are informed that in the litigation growing out of said fire heretofore determined in the chancery court of Shelby county and in the supreme court of the State the facts as alleged in the bill were established, and they believe the same as therein averred to be true; but, inasmuch as the said policies were in writing and inasmuch as an accurate statement of their dates and contents is or may be material to the results in this cause, respondents demand that the originals of said policies be produced in evidence at the hearing.

They believe that said policies severally covered the lots of cotton as averred in the bill. They say that the value of all of the
667 cottons destroyed by said fire was fully established in the litigation already determined. They are willing to admit the values as thus established, but deny any other.

9.

Respondents admit the execution of the trust deed by the Merchants' Cotton Press and Storage Company to Napoleon Hill, S. R. Montgomery, and Thos. J. Allen, Jr., said trust deed being filed as Exhibit "A" to the bill. The contents of said deed will best appear from an inspection thereof, and respondents are advised that they need not make further answer in respect thereto.

They deny that the rental value of said property since the execution of said trust deed has been about eight thousand ($8,000) dollars per annum. It has, in fact, been about seven thou-
668 sand ($7,000) dollars per annum; but an accurate account of said rents has been kept, and the exact amount received from that source will be put in evidence by respondents at the hearing.

10.

Respondents admit that by the decree of the supreme court of Tennessee in the case of R. H. Deming & Co. *v.* The Merchants' Cotton Press and Storage Co. *et al.* it was adjudged that the $301,750 of fire insurance held by respondent compress company should be devoted *and* primarily to pay the owners of said cotton who had no other insurance and to indemnify the carriers who were liable

on their bills of lading for the loss thereof and who had contracts with the respondent compress company obligating that company to carry insurance for their indemnity; they admit that the
669 losses of such uninsured owners and carriers, of the liability of the C., V. & C. line shall be established, exceeded the whole amount of fire insurance held by the defendant compress company, and that if the liability of the C., V. & C. line shall be established no part of said fire insurance fund will remain for contribution with the marine insurance companies whose assured did not hold bills of lading of the C., V. & C. line.

11.

They say that if the liability of the C., V. & C. line shall not be established, that the reserved fund of $210,224.37 will belong first to respondent, The M. C. P. & S. Co., so far as necessary to reimburse it for the 14.45 per cent. of the losses paid by it to uninsured owners and carriers heretofore held liable who had contracts with
670 said compress Co. requiring it to carry full insurance for their protection; that by the decrees of the supreme court of the State of Tennessee in the cases of the Lancaster Mills, E. H. Coates & Co., and R. H. Deming & Co. against The M. C. P. & S. Co. the said compress company has paid to such owners and cariers the sum in the aggregate of $13,265.64, with interest thereon from Feb'y 16, 1886, and that it is entitled to be reimbursed that sum with interest out of said fire insurance.

Respondents are further advised that on the theory of the non-liability of the C., V. & C. line the said fire insurance fund, after reimbursement of said compress company to the extent aforesaid, will stand subject to contribution with the marine companies whose policies did not contain what is commonly known as the American clause or whose policies, if containing that clause,
671 are subsequent in date to the fire policies held by said compress company.

12.

The said compress company wholly denies that it has failed to perform its duty in respect of the collection of the fire insurance held by it. It denies that it has been guilty of any breach of duty in that respect. It says that the failure to collect said fire insurance, so far as the same has not been collected, has been wholly due to a denial of liability on the part of the fire insurance companies and a refusal on their part to pay. It says that, aside from all other considerations, it had not the least motive to induce the fire insurance companies not to pay. It had every motive to the contrary, inasmuch as payment would
672 have put in hand so much fund for the indemnity of said compress company and of the parties whom it was bound to indemnify and protect. It denies that it is liable to complainants or cross-complainants for the value of said cottons covered by the bills of lading of the C., V. & C. line, or in any amount whatsoever. It denies that it has rendered itself liable to any of the parties in

interest by reason of the failure of one or more of the fire — companies in which it held policies of insurance. It says that it has made every effort to collect the fire policies. It says further on that subject that as early as September, 1888, it deposited the fire policies in the hands of the clerk and master of the chancery court of Shelby county, Tennessee, notified all parties in interest of the deposit, and gave each of said parties their liberty to use said
673 policies in suits or otherwise as they might deem proper and also the liberty to use the name of the compress company in such suits if deemed necessary and advisable.

13.

Respondents, for further answer, say that the said contract of May 24th, 1887, between the respondent compress company, on the one side, and the Cairo & Vincennes Railroad Company, on the other side, the same being executed in behalf of said railroad company by its receivers, Thomas and Tracy, is void and of no effect and no recovery can be had thereon against respondent compress company; that said receivers had no power to locate an agent at Memphis, Tennessee, for the purpose of making contracts of affreightment such as are embodied in the bills of lading exhibited with
674 the original bill and the cross-bill herein; that said receivers had no power to accept delivery of cottons for the Cairo and Vincennes Railroad Co. into a compress at Memphis; that the bills of lading acknowledging delivery are void and of no effect and create no liability against the C., V. & C. line; that said receivers themselves had no power to make contracts for through transportation such as were evidenced by said bills of lading, and that the said contract of May 24th, 1877, was and is absolutely void and of no effect.

14.

Respondents, further answering, say all of the bills of lading issued to Jones Bros. & Co. were void and of no obligatory force, for the reason that by a secret arrangement between L. L. Fel-
675 lows, agent of said railroad company, and the said Jones Bros. & Co. the former made what was called a rebate of part of the freight money to the latter, thus making a discriminative or lower rate than the established rate by rail and river in favor of said Jones Bros. & Co. in violation of the general law of the land on that subject.

15.

Respondents, further answering, say that the respondent compress company is not liable in any amount whatever to the holder of the said bills of lading of the C., V. & C. line, for the reason that the agent of said line unreasonably and negligently failed to transport said cotton after the same had been compressed and made ready for transportation, the said defendant compress company having promptly, after the receipt thereof, com-

pressed and being at all times thereafter ready to load
676 the same on the cars or vessels of the carrier. The general fact, as this respondent avers and charges, is that the agent of the C., V. & C. line, by a secret cut upon the freight rate made by him to Jones Bros. & Co., had so lowered the proportion of the through-freight rate that would go to the steamboats for carrying the cotton from Memphis to Cairo that said steamboats refused to carry the same. The result was an enormous accumulation of cottons in the press, due solely to the failure of said C., V. & C. line, through its agent, to make proper and reasonable arrangements for the transportation thereof; and the further fact is that because of this failure to transport the cottons covered by the bills of lading of the C., V. & C. line the respondent compress company, on
677 or about the — day of November, 1887, issued an order to said West Navy Yard press to receive no more cottons for the account of said C., V. & C. line that were to be transported by river. After this order had been issued and the agent of the C., V. & C. line notified thereof he, the said agent, fraudulently and with the intent to deceive the employees of the compress company at said West Navy Yard press, procured or induced the shipper to procure a permit from the agent of the N. N. & M. V. Railroad Company as the initial carrier out of Memphis. By this artifice and device the said Fellows procured about 1,000 bales of cotton to be admitted into the press under said permit, and thereafter issued bills of lading therefor for transportation by river to Cairo and thence by
678 rail, thus committing a fraud upon the respondent compress company.

Respondents are advised that although it is true that the said contract of May 24th, 1887, does not in express terms require the carrier to remove the cottons from the press in a reasonable time after the same should have been compressed, that the law will imply that obligation; that the large accumulation of cotton in the press covered by the b's l. of the C., V. & C. line was due to the unreasonable failure on the part of the agent of the C., V. & C. line to remove said cottons, and that the law will not award a recovery against the defendant compress Co. for the loss of the cottons thus accumulated by the wrongful act of the said C., V. & C. line.

Respondent compress Co. and the shippers of said cotton
679 made every effort to induce the agent of the C., V. and C. line to move said cotton before the fire occurred, but without success.

Respondent compress company, further answering on this point, says that its liability, if any, to the C., V. & C. line must be wholly based upon its breach of the obligation to carry insurance as contained in said contract of May 24, 1887. It says that the insurance companies located in the city of Memphis, by a resolution of the board of underwriters about a year before said fire, determined to issue no policies of insurance upon cottons unless the same contained the co-insurance clause; that respondent compress company being obliged to carry full insurance and policies containing the co-insur-

ance clause, being in legal effect only a partial insurance in the
680 event of a partial loss, said compress company had refused to accept policies in that form and had in consequence thereof been forced to a large extent to procure its insurance in other States. Hence it was that of the whole $301,750 of insurance held by the said compress Co. at the time of said fire $105,000 was represented by policies issued by Green & Montodonico, agents at Memphis, Tenn., and containing the co-insurance clause. These last-mentioned policies were taken, as the dates thereof show, very recently before the fire in the effort made by the respondent compress company to carry full insurance. The respondent compress company could at that time procure no more insurance upon the cottons in said press unless it would accept policies containing the co-
681 insurance clause, which it desired to do only to the most limited extent possible, apprehending that in the event of a partial loss a policy containing the co-insurance clause would not be in fulfillment of its obligation to carry full insurance.

The failure to have full insurance upon said cottons in the press was due to the exceptional and extraordinary accumulation of cottons therein because of the failure of the C., V. & C. line to transport the same, some of the cottons destroyed by the fire in said press having been received into said press as early as the — day of October, 1887.

Respondents will put in evidence the date of the receipt at the press of each and every of said lots of cotton covered by the bills of lading of the C., V. & C. line, from which the unreason-
682 able delay and neglect of said line to move said cottons will be manifest to the court.

Respondent compress company upon the circumstances stated denies any liability whatever to owners of said cottons or to those claiming in the right of said owners.

16.

In addition to the matters hereinbefore stated respondent compress company, for a more specific answer to the cross-bill of the Delaware Mutual Safety Insurance Company and Thomas and Tracy, receivers, say—

They admit the delivery of (500) five hundred bales of cotton by Jones Bros. & Co. on or prior to Nov. 3, 1887, consigned to order at Lowell, Mass.—notify Tremont & Suffolk mills—but they deny that said cottons were sold by Jones Bros. & Co. before the same
683 were delivered into the press. They say that the contrary is true; that said cottons were the property of Jones Bros. & Co. when delivered into the press and remained their property at least until the draft attached to the bill of lading was cashed by the Memphis bank. They are advised that said cottons remained and were the general property of Jones Bros. & Co. until the draft was paid, the bank holding title thereto only as security for the draft. In any event, they say that the rights of cross-complainants depend wholly upon the rights of said Jones Bros. & Co. or to cross-complainants, either directly or through the liability of the said C., V.

& C. line, the liability on either ground being here fully denied, as is also the liability of the C., V. & C line, either to the consignees or consignors under said bill of lading, construed in the light of
684 the attending circumstances, as hereinbefore stated.

Respondent compress company admits the filing of the intervening petition in the U. S. circuit court for the southern district of Illinois (in the case in which said Thomas & Tracy were appointed receivers) by the Tremont & Suffolk mills in its own right and in the right of its insurer; it admits the said receivers notified it of the filing of said intervening petition and required it to appear and defend the same, but denies that it refused to so appear. The fact is that respondent compress company at or about the same time that it was first informed of the filing of said intervening petition, *and* required *it* to appear and defend the same, but denies that it refused to so appear. The fact is that respondent compress
685 company, at or about the same time that it was first informed of the filing of said intervening petition, was also informed of the agreement between the petitioners and the receivers to the effect that no further steps should be taken under said petition until the litigation in the courts of Tennessee should have ended, except such as were necessary to protect the rights of said intervening petitioners in the event of foreclosure sale by the reservation of a fund. Shortly after the decision of said case of Deming & Co. against The Merchants' Cotton Press and Storage Co., at the April term, 1891, of the supreme court of Tennessee, the respondent compress company, through its attorneys, commenced a correspondence with the attorneys of the receivers, Thomas & Tracy, giving the said attorneys a full statement of the scope
686 and results of the litigation in Tennessee and asking from them the status of the proceedings in said United States circuit court for the southern district of Illinois. It is true that respondent compress company was reluctant and expressed its reluctance to undertake the defence of a case in another State; but whilst it was considering whether it would or would not do so it was suddenly informed by the filing of this bill and cross-bill and the exhibits thereto attached that the receivers, from whom it had, as it is advised, the right to expect and demand every reasonable support, had made common cause with the adversaries of this respondent, and in consideration of the release of the line by them represented had agreed to adopt a course that they believed would and intended should result in fixing the loss on this re-
687 spondent, and in consideration of the release of the line by them represented had agreed to adopt a course that they believed would and intended should result in fixing the loss on this respondent and the fire companies in which it held policies.

The statement in the document *is* exhibited with the cross-bill to the effect that the liability of the C., V. & C. line had been practically established, making any further ligation on that point useless, is, as respondents believe, a mere pretense. The said receivers, by the arrangement entered into between them and the complainants, abandoned all effort to defend the C., V. & C. line in said United

States circuit court for the southern district of Illinois and agreed to appear in the courts of Tennessee, where the question was, as
688 they believed, prejudged. It was the purpose of the receivers by that arrangement to secure a release of themselves and said line and to afford to the complainants the opportunity to litigate the question of the liability of the C., V., & C. line in the courts of Tennessee, thus abandoning whatever chance there was of a successful defense of the C., V. & C. line's liability in the Federal courts. It is apparent that this course would never have been taken by the receivers except from the fact that they thereby secured a release to themselves under an undertaking by which they agreed to combine and confederate with plaintiffs in the effort to saddle the loss on the respondent compress company and the fire companies. In other words, the said receivers not only deserted the respondent
689 compress company, to which it owed allegiance and support, but by the agreement with its adversaries entered actively into a confederation with the plaintiffs to enable said plaintiffs to fix the liability on the compress company and its fire companies. Its voluntary appearance, no process having been served on it, in this cause is entered in furtherance of the scheme to release said line and fasten the loss on the respondent compress company and said fire companies.

Respondent compress company submits that the only right of the plaintiffs to a recovery against it depends upon a *bona fide* litigation and a final adjudication therein of the liability of the C., V. & C. line. It further submits that the collusion and confed-
690 eration between the plaintiffs and said C., V. & C. line, whereby the latter not only abandons its defenses, but also abandons its domicile in order to come into a court of to it foreign jurisdiction and there admit its liability as a consideration for the cotemporaneous release of that same liability, is such palpable and conclusive evidence of bad faith toward this respondent as will and ought to repel it and any and all persons claiming under it from any benefit or advantage thereof. It does certainly, as respondent compress company is advised, render impossible the procurement of a judgment by plaintiffs against the C., V. & C. line in a court of competent jurisdiction and in a cause in which the alleged liability of the C., V. & C. line is *bona fide* defended.

The course of the C., V. & C. line has been such as to
691 throw upon this respondent the whole burden of defending its liability in the effort to defend itself, and this respondent submits that inasmuch as its liability, if any, is simply to indemnify and save harmless the said C., V. & C. line that no liability will be put upon it in favor of that line under the circumstances herein stated.

It is further advised that the right, if any, of the C., V. & C. line (through which the complainants and cross-complainants seek to recover against the respondent compress company) is to have such judgment as in equity it may be entitled to to indemnify the said C., V. & C. line against any judgment that may be recovered against it; that the recovery of any judgment whatever against the said line

is impossible by reason of plaintiffs having released it from
692 any and all liability.

Respondent compress company is advised that by said contract of May 2nd, 1887, its obligations, if any, *was* to indemnify and save harmless the C., V. & C. line, and is further advised and submits — the court that the release of the C., V. & C. line operates necessarily as a release — respondent, and that no recovery can be had against this respondent on the basis of its obligation to carry insurance for the indemnity of that line. The said line has not been damaged, inasmuch as it appears that the holders of the claims have released it from all liability.

Respondent compress company is further advised and submits that it was well known both to cross-complainants and to said receivers, Thomas & Tracy, that the courts of Tennessee had
693 declared the liability of the C., V. & C. line on its bills of lading here involved. It was, therefore, also well known to them that when the C., V. & C. line by its own voluntary act transferred the litigation from the Federal court of Illinois to the courts of Tennessee it inflicted, as far as it was in its power to do so, a certain loss on this respondent, and respondent submits to the court the said C., V. & C line, as the holder of the alleged contract of indemnity, will not be permitted to recover on that contract under the circumstances.

17.

Respondent, -or a more particular answer to the cross-bill of R. H Deming & Co., for the use of the Phœnix Insurance Co. of New York and of the said Phœnix Insurance Company, says it
694 denies that said Phœnix Insurance Co. at any time tendered the exact amount claimed to be due to it on the fire policies held by the respondent compress company for the sum in the aggregate of $35,000. It says that on the 17th day of September, 1890, the said Phœnix Insurance Company did tender to the respondent compress company the sum of $29,067.95, which was the balance unpaid upon its said fire policies, with interest from the 15th day of August, 1890. The said Phœnix Insurance Company when making said offer to pay tendered it as being in full of said policies and interest, and because of the refusal of said respondent to accept the same as payment in full of said policies the Phœnix Ins. Co. refused to pay the same. Respondents then and there offered to accept the sum tendered and to give a receipt therefor, leaving
695 for future determination the question as to whether the said sum was in full of the liabity of said Phœnix Insurance Company, but that offer on the part of respondent was refused, and said Phœnix Insurance Co., as already stated, thereupon refused to make any payment whatever, and the fact now is that, notwithstanding the somewhat extraordinary averments of the cross-bill, said Phœnix Co. has not only failed upon the demand of the respondent compress company to pay the full balance of its policies, with interest from Feb. 17th, 1888, but has failed to pay the amounts or any part thereof adjudged against it in favor of the New-

port News and Mississippi Valley Railway Co., the L., N. O. & T. Co., E. H. Coates & Co., and Hooper & Buffington, the amounts decreed in favor of said parties under the decree of the supreme
696 court of Tennessee at the April term, 1891, being 14.548 of its policies, to wit, the sum of $5,092.00, with interest from Feb'y 17, 1888. This amount is in actual judgment against the Phœnix Insurance Co. for the indemnity of the parties aforesaid under the decree of the supreme court of Tennessee at the April term, 1891, and yet the Phœnix Insurance Co., whilst making boast of its administration of liability to the whole balance of its policies, has thus far refused to pay even the percentage adjudged against it as an indemnity to carriers, who were before the court, against whom judgments were rendered, and who have been obliged to pay the same.

697 Respondent denies that said Phœnix Ins. Co. made any tender into court in said Deming case or elsewhere. It did in its answer admit its liability in full on the fire policies, and this it did for the purpose, if possible, of avoiding about $250,000 of liability on its marine policies held by the consignees of said cottons.

It is wholly untrue that the respondent compress company failed and refused to take judgment against it on its fire policies on the admission of its answers. The judgments were taken and entered as ordered by the court, and the holders of the bills of lading of the C., V. & C. line were parties of record, and it was not only competent to them, but it was their business, if they desired judgment for the full amount of its policies against the Phœnix Insurance
698 Co. upon its answer, to have claimed it. It denies that said Phœnix Insurance Company is not liable for interest after the tender made as aforesaid. It says it and all of the fire companies, so far as they are liable upon said fire policies, are liable therefor, with interest from Feb. 17th, 1888. Respondent admits that, of the cottons destroyed by said fire, 5,087 bales were covered by the bills of lading of the C., V. & C. line, not including therein the 150 bales belonging to Hooper and Buffington and R. H. Coates & Co., whose rights have been disposed of in the cases already determined by the supreme court of Tennessee.

It admits that the value of said cottons was as established by the decree of the supreme court of Tennessee at the April term,
699 1891, in the said case of R. H. Deming and Co. against the M. C. P. & S. Co. *et al.*

Respondent compress company, further answering, says that it is not true that either since the decision of the Deming case or at any time it has refused or declined to make every proper effort for the collection of the fire policies held by it.

It denies that the failure to collect has been because of dereliction on its part, and says that the failure to collect has been wholly due to the refusal on the part of said fire companies to pay. In this connection it says, further, that all of said fire companies, except the Phœnix Ins. Co., this complainant, has paid the amounts awarded against them by the decree of supreme court of Tennessee at its

April term, 1891, in the Deming case in favor of the N. N. &
700 M. V. Co., the L., N. O. & T. Co., Hooper & Buffington, and E. H. Coates & Co. The said companies have failed and refused to pay the $210,224.37 required to be paid by them and held in reserve by respondent compress company until the liability of the C., V. & C. line should have been determined and other questions necessary to a proper disposition of said funds should have been settled.

The Phœnix Ins Co. has refused to pay any amount whatever.

18.

For a more particular answer to the cross-bill of Thomas & Tracy, as receivers of the Cairo division of the Wabash, St. Louis & Pacific R. R. Co., they say they suppose it to be true that the said Thomas & Tracy were first appointed trustees and afterwards re-
701 ceivers in a bill to foreclose the trust deed made by the Wabash, St. Louis & Pacific R. R. Co.; that said last-named company is a corporation formed by the consolidation of several other corporations and existing under the laws of the States of Missouri, Illinois, Indiana, and Ohio.

But respondents require that all of the allegations in respect of the appointment of and qualification of said Thomas & Tracy as such receivers be proved as alleged in the bill.

Respondents admit the execution of the contract of May the 24th, 1887, between the respondent compress company and the Cairo & Vincennes R. R. Co. as averred in said cross-bill. They say, however, upon information and belief that there was at that time
702 no such corporation as the Cairo & Vincennes R. R. Co., and that the said contract is therefore void and of no effect.

They admit that said contract by its terms required the respondent compress Co. to carry insurance to the extent stated "in good and solvent companies." They say that the $301,750 of insurance held by the respondent compress company at the time of said fire was in good and solvent companies within the meaning and intent of said contract.

Further answering, they say that if the liability of the C., V. & C. line shall be established that the said line, under the decree of the supreme court of Tennessee in the said case of Deming & Co., is entitled — from said fire insurance companies 85.55 % of the value of said cottons covered by its bills of lading, and that it has no
703 claim in any event against the respondent compress company except for 14.45 % thereof. Respondent admits that of the said $301,750 of insurance held by the respondent compress company only about $200,000 was held in insurance companies having agencies in the State of Tennessee; but they say, as has been hereinbefore stated, that the fact that $101,750 of said insurance was taken in companies outside the State of Tennessee and having no agencies therein was due to the failure of said C., V. & C. line to transport the cottons lying in the press under its bills of lading and ready for transportation and to the consequent necessity thus forced upon this respondent compress company by the C., V. & C.

line of going out of the States in its effort to carry full insurance upon all the cottons.

Respondents deny, however, that the said $1,017,750 of
704 insurance is void. They say that the policies were issued in the regular course of business, each of the companies issuing the same at their own respective domiciles, and wholly deny that the said companies were engaged in carrying on the insurance business in the State of Tennessee.

Respondents say in this connection that said companies have at no time claimed that said policies were void. They deny that it is competent to cross-complainants to make that question in their behalf. Respondent, further answering, denies that the respondent compress company has made or engaged in any combination, confederacy, or conspiracy with the fire companies in which it held policies to prevent or defeat the collection of said policies. The whole agreement between them has long since been put in
705 evidence in the cases already decided by the supreme court of Tennessee, and will again be produced in evidence if necessary in this case.

They deny that the respondent compress company entered into any agreement the purpose or legal effect of which was to destroy the trust fund; deny any liabilities against the compress company on that ground or upon any of the other grounds in this connection stated.

19.

Respondents do not confine the answer hereinbefore made to said cross-bills to the paragraph hereof specially pointing to cross-bills, but pray that the whole of this answer may be taken as a response to the original and amended bills and to the several cross-bills herein filed against them and others.

706 20.

Respondent The M. C. P. & S. Co., for a more particular answer to the cross-bills of the Marine Ins. Co., Limited, of London, says:

It admits that the Warren Mnfg. Co. had 505 bales of cotton destroyed in said fire; that the said Warren Mnfg. Co. held a marine policy of insurance issued by said Marine Ins. Co. and covering said loss, and that the said Marine Co. has paid the full amount of said loss to said Warren Mnfg Co.

Respondent denies that the whole of said 505 bales of cotton *were* covered by the bills of lading of the C., V. & C. line; it says that 405 bales thereof were covered by the bills of lading of the C., V. & C. line, and 100 bales thereof by the bills of lading of the L., N. O. & T. R'y Co.; it admits that the said 405 bales covered by the
707 bills of lading of the C., V. & C. line were of the value — $21,010.41.

It admits that Foster and Nightingale had 100 bales destroyed in and by said fire, of the value of $5,346.24, covered by the bills of lading of the C., V. & C. line; that Foster and Nightingale held a marine policy issued by the cross-complainants, and the said

cross-complainants have fully paid said loss to said Foster & Nightingale.

It denies the allegations on page 5 of the cross-bill that there was no consideration for the clause contained in the bills of lading of the said C., V. & C. line exonerating that line from a loss by fire. It says that said clause was contained in a through bill of lading, for a through rate of freight, less than the aggregate local rate, and that in said reduced rate of freight, and the many other ad-
708 vantages attending the contract for through carriage, the shipper received ample consideration for the exemption clause.

Respondent The M. C. P. & S. Co., for a more particular answer to the cross-bill filed by the Union Marine Ins. Co., Limited, of Liverpool, says:

It admits that W. H. L. Oppenshaw had 1,202 bales of cotton destroyed in and by said fire; that 395 bales thereof were covered by the bills of lading of the Kanawha despatch, and 807 bales thereof by the press receipts of this respondent; that said 395 bales were of the value of $18,898.74, and said 807 bales were of the value of $38,398.79. The said Oppenshaw held a marine policy issued by cross-complainants covering said loss, and that
709 he has been fully paid by the said Marine Co. therefor. It says that it has been already adjudged that neither Kanawha despatch nor this respondent were liable for said loss, and this respondent denies any reliability whatever on its part.

22.

For a more particular answer to the cross-bill of the British and Foreign Marine Ins. Co. of Liverpool, respondent The M. C. P. & S. Co. says:

It admits that E. R. Robinson had 23 bales of cotton destroyed in and by said fire, of the value of $1,406.20, covered by the bills of lading of the C., V. & C. line; that said Robinson held a marine policy issued by the cross-complainant, covering said loss, and that the cross-complainant has fully paid him therefor.

Respondent denies any and all liability for said loss; it
710 denies that the C., V. & C. line is liable therefor.

It denies that the clause contained in said bills of lading exonerating it from a loss by fire is unjust, unreasonable, or not supported by a sufficient consideration. It says, on the contrary, that the said clause contained in a through bill of lading for a rate of freight lower than the aggregate of local rates, and with many advantages and savings attending such contract for through carriage, is supported by an ample consideration, and is both just and reasonable.

23.

For further answer to said three last-mentioned cross-bills, respondent repeats all the matters in this bill contained so far as material thereto, and prays all the benefit that it would de-
711 rive from such matters if the same were here now literally reiterated.

Respondents, having now fully answered said original, amended, and cross-bills, so demur to the same upon the grounds following, to wit:

First. It appears upon the face of said bills that there was no such corporation as the Cairo & Vincennes Railroad Company, in whose behalf the said contract of May 24, 1887, purports to have been executed by the receivers Anthony J. Thomas and Chas. E. Tracy.

The said contract is therefore void.

Second. The said receivers had no power to make said contract, and the same is on that account void.

Third. The liability of the defendant compress company depends upon the liability of the C., V. & C. line.

712 The bills on their face fail to show liability on the part of that line, because—

a. The said receivers Thomas & Tracy had no power to locate an agent in the city of Memphis, Tenn., and there to acknowledge receipt of and in consequence to fix liability upon the C., V. & C. line for cottons delivered to said compress company.

The bills show on their face that there was no delivery of said cottons to said C., C. & C. line or its receivers, and that all the acts of said receivers in issuing said bills of lading, as well as making the contract of May 24, 1887, were *ultra vires* and void.

b. The bills of lading of the C., V. & C. line exhibited with the bills of complaint contain in the body thereof a clause exonerating the said line from liability for a loss by fire, and, the complainants failing to allege negligence on the part of said line,

713 its agents, employees, or servants, the said clause is sufficient to exonerate the line from liability. The said C., V. & C. line not being liable, the defendant compress company, whose liability depends upon that of the C., V. & C. line, is also not liable.

c. The said C., V. & C. line is not liable, and consequently the defendant compress company is not liable for the further reason that said receivers, Thomas & Tracy, had no power to make such through contracts of affreightment as are evidenced by said bills of lading, it appearing upon the face of the bills that the said receivers undertook, through their agent at Memphis, Tenn., and in respect of cottons in a compress at Memphis, Tenn., to make said contracts for through transportation and to assume the liability

714 of a common carrier in respect thereto, the said cotton being about one hundred and fifty miles from the nearest point of said C., V. & C. line, and not appearing to have been actually or constructively delivered to it by the facts stated in the bills of complaint.

Fourth. The said C., V. & C. line, in whose rights the complainants sue, is entitled, if at all, to recover against the defendant compress company on the said contract of May 24th, 1887.

That contract, if binding, is one of indemnity only, obligating said compress company to carry sufficient insurance to protect the said C., V. & C. line against liability for a loss by fire. The said line has suffered no damage by reason of the alleged breach of that

obligation, it appearing that the complainants have released it from any and all liability on account of the loss of said cottons.
715 It can, therefore, have no recovery over against said compress company.

5th. Plaintiffs' rights of recovery, if any, are against the C., V. & C. line alone. It is for that line, if subjected to liability for the loss of said cottons, and after it shall have been subjected, to seek its remedy over against defendant compress company upon said contract of May 24, 1887. It cannot, in this proceeding, avail itself of such right of recovery over.

Sixth. The said C., V. & C. line has lost and forfeited all right of recovery over upon said contract of May 24, 1887, if any it had, by reason of the fact, apparent on the face of plaintiffs' pleadings, that it had confederated and combined with the plaintiffs to aid the plaintiffs as far as possible to fix liability on the defendant
716 compress company in consideration of a release by the plaintiffs of all claims and demands upon and against said C., V. & C. line and its receivers.

If said C., V. & C. line, by its voluntary appearance in this suit, entered in furtherance of the scheme aforesaid, shall be subjected to liability, it will, under the circumstances appearing, be denied any recovery over against the defendant compress company.

Seventh. The above fourth ground of demurrer, whilst directed to the bills and cross-bills generally, is more specifically pointed to the cross-bill filed by the Delaware Safety Insurance Company and by Thomas and Tracy, receivers, for the use of said company.

Eighth. To the cross-bill filed by Thomas & Tracy, receivers of the C., V. & C. line, they assign, in addition to those already
717 stated, the following grounds of demurrer, to wit:

a. The said cross-bill fails on its face to show any ground of recovery whatever in respect of the fifty bales of cotton belonging to Hooper and Buffington and the 100 bales belonging to E. H. Coates & Co. Neither Hooper & Buffington nor said Coates & Co. are parties to this proceeding, and it appears upon the face of the pleadings that their rights have been fully disposed of in the cases already determined by and in the supreme court of Tennessee.

Neither said Hooper & Buffington nor said Coates & Co. are seeking any relief against the C., V. & C. line or the receivers thereof.

b. Said cross-bill denies delivery of said cottons to said
718 & 719 receivers, and generally denies all grounds of recovery on the part of the original or other cross-complainants against them, the said receivers. It therefore does not and cannot aver or show any ground of recovery over on the part of the said receivers against the defendant compress company.

The said receivers cannot maintain a cross-bill against the defendant compress company seeking recovery over against the latter company if recovery shall be had against them.

And now, having fully answered, respondents pray to be hence dismissed with their costs.

METCALFE & WALKER,
TURLEY & WRIGHT, *Sol's & C.*
[SEAL.] MERCHANTS' COTTON PRESS & STORAGE CO.,
J. M. FOWLKES, *Secretary.*

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720 Answer of and demurrer of Royal Insurance Co., Liverpool, London, and Globe Ins. Co., National Fire Insurance Co.,
721 Continental Insurance Company, Fire Association, and Home Insurance Co. of La. to original and amended cross-bills.

Filed 12th day of Jan., 1892.

In the Chancery Court of Shelby County, Tenn.

THE INSURANCE CO. OF NORTH AMERICA OF PHILADELPHIA *et al.* *vs.* DELAWARE MUTUAL SAFETY ASSURANCE COMPANY *et al.*	Original Bill. = 7994, R. D.
DELAWARE MUTUAL SAFETY ASSURANCE COMPANY and THOMAS & TRACY, Receivers, *vs.* THE INSURANCE COMPANY OF N. AMERICA OF PHILADELPHIA *et al.*	Cross-bill.
R. H. DEMING & Co., for the Use, & etc., and THE PHŒNIX INSURANCE COMPANY OF NEW YORK *vs.* THE DELAWARE SAFETY ASSURANCE COMPANY *et al.*	Cross-bill.
A. J. THOMAS and CHAS. E. TRACY, Receivers, etc., *et al.*, *vs.* THE INSURANCE COMPANY OF NORTH AMERICA OF PHILADELPHIA *et al.*	Cross-bill.
MARINE INSURANCE COMPANY, LIMITED, OF LONDON *vs.* THE MERCHANTS' COTTON PRESS & STORAGE CO. *et al.*	Cross-bill.
UNION MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL *vs.* THE MERCHANTS' COTTON PRESS & STORAGE CO. *et al.*	Cross-bill.

UNION MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL
vs.
723 THE MERCHANTS' COTTON PRESS & STORAGE CO. *et al.* } Cross-bill.

THE BRITISH & FOREIGN INSURANCE COMPANY, LIMITED, OF LIVERPOOL
vs.
THE MERCHANTS' COTTON PRESS & STORAGE CO. *et al.* } Cross-bill.

The answer and demurrer of The Royal Insurance Company, The Liverpool, London & Globe Insurance Company, The National Fire Insurance Company, The Continental Insurance Company, The Fire Association and the Home Insurance Company of Louisiana to the original and amended and cross bills filed in the above-entitled cause.

Respondents, for answer to the bill filed against them and others, say:

1.

They admit that by a fire occurring on the 17th of Nov., 1887, in one of the presses of the M. C. P. & S. Co., located in the
724 old navy yard grounds and known as the West Navy Yard press, there was destroyed by fire about fourteen thousand bales of cotton then in the custody of the said Merchants' Cotton Press & Storage Company. The exact amount so destroyed was thirteen thousand eight hundred and eighty bales.

They admit that of the cottons thus destroyed by fire 5,087 bales, of the value of $245,735.46, were covered by the bills of lading of the Cairo, Vincennes & Chicago line.

3.

They deny that said C., V. & C. line is liable to the owners of said cottons for the loss thereof.

They say that the C., V. & C. line is not liable for such loss for the reason that the consignors, by a special stipulation
725 written or stamped on the face of the bills of lading and accepted by them, assumed the fire risk until the cotton should be landed at Cairo, Ill., and for the further reason that the C., V. & C. line was exempt from a loss by fire under the general terms of its bills of lading. Said bills of lading are filed or promised to be filed by the complainants herein, and respondents will rely upon the same as avoiding any liability on the part of said C., V. & C. line for a loss by fire, the said cottons having been lost by the negligence of said C., V. & C. line, its agents, servants, or employees. They deny that the exemption from liability as contained in said bills of lading does not apply to a loss by fire whilst the cottons were in a compress. They say, on the contrary, that the
726 language of the bills of lading is in itself broad enough to cover such loss, and that the facts and circumstances attend-

ing and the time at which the bills of lading were issued make the fire-exemption clause as therein contained peculiarly and especially applicable to a loss by fire whilst the cottons were in a compress. The facts material to this point are:

First. That the carrier did not and would not have received any compensation or consideration whatever for the assumption of any liability in respect of said cottons before the actual delivery thereof to said carrier. The cottons were only constructively, if at all, delivered to said carriers, the actual delivery being to the Merchants' Cotton Press & Storage Co. Upon delivery to the last-named company its press receipts were executed and delivered to the shipper, and thereafter the shipper delivered
727 the same to the agent of the carrier and took a bill of lading therefor. The cottons were delivered uncompressed, with the privilege to the carrier of compressing, the carrier to pay the cost of compressing, to wit, ten cents per hundred pounds, and including the same in the rate of freight filed in the bill of lading. For example, the bill of lading for the one hundred and fifty bales of cotton consigned to the Shore mills, at Fall River, Mass., filed as the first bill of lading exhibited with the bill, shows a rate of freight of fifty-three and a half cents per one hundred pounds. The real rate of freight was forty-three and a half cents per hundred pounds, ten cents being added thereto to cover the cost of compressing and other services to be rendered by the compress
728 company. The ten cents per hundred pounds thus included in the rate of freight and to have been collected by the carrier from the shipper would, when collected from the shipper by the carrier, have been paid over to the compress company for its services of compressing, etc. The carrier was the mere medium of collecting and paying over the amount necessary to be paid for compressing, etc., and it received no consideration whatever for any assumption of liability whilst the cottons were in the press.

Second. The bills of lading were issued by the carriers whilst the cottons yet remained in the press and before actual delivery to the carriers at the instance and request and for the convenience and advantage of the shipper. It was necessary that the shipper should get his bill of lading as promptly as possible in order
729 to enable him to draw against the shipment and get the draft discounted at one of the banks to put him in funds with which to pay the factor from whom the cotton was bought. The great body of shippers were unable to pay for the cottons bought by them otherwise than by checking against the proceeds of the drafts to be drawn against the shipments. The banks would not discount such drafts unless they were attached to and accompanied by the bill of lading as security for the ultimate payment thereof by the drawee.

To meet this necessity and enable the shipper to get his bill of lading as promptly as possible the carriers generally entered into contracts with the compress company, in terms substantially
730 like that referred to in the bill of complaint between the compress company and the receivers of the C., V. & C. line,

and undertook generally and did customarily issue their bills of lading upon the surrender to them of the press receipts. The compress company, as respondents are advised, became from the time the bill of lading issued until the loading on the cars should occur, the bailee of the carrier, the shipper holding and looking to the bill of lading issued by the carrier. This system and course of business was universally adopted and acted upon by the shippers and carriers at and for several years before the said fire of Nov., 1887.

As already stated, it was adopted mainly for the convenience and advantage of the shipper to enable him to get his bill of
731 lading without awaiting the actual compression and delivery of the cottons to the carrier.

Third. As already determined by the supreme court of Tenn. in the case of The Lancaster Mills *vs.* The Merchants' Cotton Press & Storage Co. and Deming & Co. *vs.* The Merchants' Cotton Press & Storage Co., the contract between the compress company and the carriers obligated the former to insure and the fire policies actually taken out by it did insure the owners' interest in said cotton as well as the carriers' liability therefor, so that the owner was fully protected without resorting to the liability of the carriers or to insurance carried by himself.

4th. It is true that the cottons were delivered by the shipper uncompressed, but it is also true that either by the express terms of the bill of lading or by agreement collateral thereto be-
732 tween the shipper and the carrier it was universally provided that the cotton should be compressed before shipment.

The cottons were delivered by the shipper himself to the compress company with the distinct understanding and agreement that they should be compressed before shipment. It is true now and was true at the time of said fire of Nov. 17, 1887, and had been the case for many years anterior thereto that all cottons going out of Memphis to foreign, Eastern, and Northern points were carried compressed. The compression reduced the bulk of the cotton by at least one-half and enabled the carrier to give a much lower rate of freight than would have been otherwise possible. Such com-
733 pression was mainly to the advantage of the shipper.

It is also true that the consignees, including the consignee whose rights are here involved, knew that the bills of lading were customarily issued upon the press receipts whilst the cottons were still in the compress, and that the cottons would remain in the compress for the purpose of compressing. This course of business had been so long prevalent that it was generally known, not only to the consignors but to the consignees. It was in fact known to the consignors and consignees whose rights are here involved.

Respondents suppose it to be true that the hazard of fire in a compress was greater than during transportation, but it is
734 also true that the hazard would have remained wholly with and upon the consignor except for the fact that the carrier, without any obligation to do so, at the instance and for the benefit of the shipper, issued the bills of lading upon the cotton,

whilst they yet remained in the press. Construed in the light of all the attending circumstances, respondents deny the allegation of the bill to the effect that the fire-exemption clause as contained in the bills of lading of the C., V. & C. line did not apply to a loss by fire of cottons whilst in a compress.

Respondents admit that of the cotton so destroyed by fire the fifty bales consigned and belonging to Hopper & Buffington and one hundred bales consigned and belonging to E. H. Coates & Co. were covered by bills of lading of the C., V. & C. line, and
735 that the supreme court of Tenn. under its decree in said cases of Deming & Co. rendered judgment against the compress company and the fire insurance companies in which it held policies, who were before the court in said litigation, for the full value of said cottons, and that in computing the amount of the fire insurance fund to be reserved as indemnity to the holders of the bills of lading of the C., V. & C. line said cottons were not included.

5.

Respondents admit the execution of the contract dated May 24, 1887, between the Merchants' Cotton Press and Storage Co. and the C., V. & C. line, as averred in the bill, but reserve the right to produce the original of said contract and to correct any inaccuracies in the company as set out in the bill, if any such there be.

736 Respondents do not admit the validity of said contract, nor do they admit the averments of the bill in respect of the construction or legal effect thereof or in respect of the objects and motives of the parties thereto making the same.

Respondents are advised that the said contract, if not binding on both parties, is not binding on either.

They are advised that the said Thomas & Tracy, as receivers of the C., V. & C. line, had no authority whatever to locate an agent in the city of Memphis with power to make the contracts of affreightment evidenced by the bills of lading exhibited with the bill of complaint; that said alleged contracts of affreightment are void, and that all acts of the said Thomas & Tracy in the premises, including the execution of said contract with respondent com-
737 press company of date May 24, 1887, are *ultra vires* and void.

6.

It is true that at the time of said fire the defendant The Merchants' Cotton Press & Storage Co. held policies of insurance covering the cottons in said press in the various companies named in the bill, the number of each policy, its amount, and the residence or domicile of the company issuing the same being correctly set forth in the bill.

The policies themselves are on file in the chancery court of Shelby county in the cases growing out of the said loss by fire on Nov. 17, 1887, and heretofore determined in that court and in the supreme court of the State on appeal. The contents thereof will best appear

from the policies themselves, which respondents will produce
738 at the hearing. Respondents believe it to be true that it was the purpose of the C., V. & C. line and its receivers and of defendant The Merchants' Cotton Press & Storage Co. by said insurance to indemnify the C., V. & C. line against any liability for a loss by fire whilst in the press of cottons covered by its bills of lading, and that it was intended that the indemnity thus to be provided should be primary to the liability of the C., V. & C. line; but respondents are advised that these questions of purpose and intent on the part of the contracting parties will be determined by the court upon the face of the contract and the surrounding circumstances which may be completely looked to in determining that question, and respondents leave its determination in that mode to the court.

739 7.

It is true that after said loss by fire the fire insurance companies in which said Merchants' Cotton Press & Storage Co. held policies as aforesaid admitted their liability to the amount necessary to pay those depositors of the cotton who held no bills of lading and who had no other insurance. The value of the cottons in that category was, as stated in the bill, $52,472.26, which sum was paid by said fire insurance companies to the compress company and was by it paid over to the owners of said cotton.

In respect to the averment of the bill as to the adjudication by the supreme court of Tennessee as to said fund of $52,472.26, and in respect of the other allegations of the bill as to the points adjudged in the supreme court of Tenn., respondents here, once
740 for all, file a copy of said decree of the supreme court of Tennessee. Its contents will best appear from an inspection thereof. Whether the same is and to what extent, if any, it is binding as *res judicata* in the present case the court will determine from an inspection of the records of the case in which decrees were pronounced, and these respondents refer to said copy of said decree for full particulars.

8.

Respondents admit that, with one or two small exceptions, all of the cotton destroyed in said fire of Nov. 17th, 1887, was covered by policies issued to the owners thereof by the various marine insurance companies stated in the bill, and probably other companies also. All of said policies are in writing, and, inasmuch as
741 an accurate statement of their dates and contents is or may be material to the result of this case, respondents demand that the original of said policies be produced in evidence at the hearing.

Respondents say that the value of all the cotton destroyed by said fire was fully established in the litigations already determined. They are willing to admit the value as thus established, but deny any other.

9.

Respondents admit that by the decree of the supreme court of Tennessee in the case of R. H. Deming & Co. *vs.* The Merchants' Cotton Press & Storage Co. *et al.* it was adjudged that the $301,750 fire insurance held by respondent compress company should be devoted primarily to pay the owners of said cotton, who had no other insurance, and to indemnify the carriers who were liable on
742 their bills of lading for the loss thereof and who had contracts with defendant compress company, obligating that company to carry insurance for their indemnity. They admit that the losses of such uninsured owners and carriers, if the liability of said C., V. & C. line should be established, will exceed the aggregate fire insurance, and that no part of said fire insurance fund will remain for contribution with the marine insurance companies whose assured did not hold bills of lading of the C., V. & C. line.

10.

They say if the liability of the C., V. & C. line shall not be established that the reserve fund of $210,224.37 will belong first to respondent The M. C. P. & S. Co., so far as necessary to reimburse it for the 14.45% of the losses paid by it to uninsured owners
743 and carriers, heretofore held liable, who had contracts with said compress company, requiring it to carry full insurance for their protection; that by the decree of the supreme court of the State of Tennessee in the cases of the Lancaster Mills, E. H Coates & Co., and R. H. Deming & Co. against The M. C. P. & S. Co., the said compress company has paid to such owners and carriers the sum in the aggregate of $—, and that it is entitled to be reimbursed that sum with interest out of said fire insurance.

Respondents are further advised that on the theory of the nonliability of the C., V. & C. line the said fire insurance fund after reimbursement of said compress company to the extent aforesaid, will stand subject to contribution with the marine companies whose policies did not contain what is commonly known as the
744 American clause, or whose policies if containing that clause are subsequent in date to the fire policies held by said compress company.

They say that all of said marine policies contain the American clause and antedate said fire policies.

11.

Respondents deny that the M. C. P. & S. Co. is liable to complainants or cross-complainants for the value of said cotton covered by the bills of lading of the C., V. & C line or in any amount whatever.

12.

Respondents for further answer say that the said contract of May 24, 1887, between defendand compress company, on the one side,

and the C., V. & C. line, on the other side, the same being
745 executed in behalf of said railroad company by its receivers, Thomas & Tracy, is void and of no effect, and no recovery can be thereon against defendant compress company or against these respondents; that said receivers had no power to locate an agent at Memphis, Tennessee, for the purpose of making contracts of affreightment such as are embodied in the bills of lading exhibited with the original bill and the cross-bills herein; that said receivers had no power to accept delivery of cottons for the C., V. & C. R. R. Co. from a compress at Memphis; that the bills of lading acknowledging delivery are void and of no effect, and create no liability against the C., V. & C. line; that said receivers themselves had no power to make contracts for through transportation such as were evidenced by said bills of lading, and that the said con-
746 tract of May 24, 1887, was and is absolutely void and of no effect.

13.

Respondents, further answering, say that all the bills of lading issued to Jones Bros. & Co. were void and of no obligatory force, for the reason that by a secret arrangement between L. L. Fellows, agent of said railroad company, and the said Jones Bros. & Co. the former made what was called a rebate part of the freight money to the latter, thus making a discriminative or lower rate than the established rate by rail and river in favor of said Jones Bros. & Co. in violation of the general law of the land on that subject.

14.

Respondents, further answering, say that their codefendant the compress company and its said fire companies are not liable
747 in any amount whatever to the holders of said bills of lading of the C., V. & C. line, for the reason that — agent of said line u-reasonably and negligently failed to transport said cotton after the same had been compressed and made ready for transportation, the said defendant compress company having promptly, after receipt thereof, compressed and being at all times thereafter ready to load the same on cars or vessels of the carrier. The general fact, as respondents aver and charge, is that the agent of the C., V. & C. line, by a secret cut upon the freight rate made by him to Jones Bros. & Co., had so lowered the portion of the through-freight rate that would go to steamboats for carrying the cotton from Memphis to Cairo that said steamboats refused to carry the same. The result was an enormous accumulation of cotton in the press, due
748 solely to the failure of said C., V. & C. line, through its agent, to make proper and reasonable arrangements for its transportation, and the further fact is that because of this failure to transport the cotton covered by the bills of lading of the C., V. & C. line, on the — day of Nov., 1887, the compress company issued an order to said Navy Yard press to receive no more cotton for the account of the C., V. & C. line that was to be transported by river. After this order had been issued and the agent of the C., V. & C.

line notified thereof he, the said agent, fraudulently and with intent to deceive the employees of the compress company at said Navy Yard press procured or induced the shippers to procure a permit from the agent of the N. N. & M. V. R. R. Co. as the initial carrier out of Memphis. By this artifice and device the said Fellows
749 procured about one thousand bales of cotton, thus inducing the said employees to believe that the cotton was to be carried by said N. N. & M. V. R. R. Co. as the initial carrier out of Memphis. By this artifice and device the said Fellows procured about one thousand bales of cotton to be admitted into the press at the West Navy Yard under this permit, and thereafter issued bills of lading therefor for the transportation by river to Cairo and thence by rail, thus committing a fraud upon said compress company and these respondents.

Respondents are advised that although it is true that said contract of May 24, 1887, does not, in express terms, require the carrier to remove the cotton from the press in a reasonabl- time after the same should have been compressed that the law will imply that obligation; that the accumulation of cotton in the press covered by bills of lading of the C., V. & C. line was due to the un-
750 reasonable failure on the part of the agent of the C., V. & C. line to remove said cotton, and that the law will not award a recovery against the defendant compress company and its fire companies for the loss of the cotton thus accumulated by the wrongful act of the agent of the C., V. & C. line.

The said compress company and the shippers made every effort to induce the agent of the C., V. & C. line to remove said cotton before the fire occurred, but without success, and respondent says that the compress company, under the circumstances, is under no liability whatever to the owners of said cotton or to those claiming in the right of said owners.

Respondents further show that the said wrongful accumulation of cotton as set forth above very materially in-
751 creased the risk and danger of same being destroyed by fire, and they further show that the policies issued by them and upon which they are attempting to be held liable all contain clauses that if any act was done by the parties interested in said cotton which increased the risk or hazard by fire thereto, then said policy should be void. Under this provision and similar provisions of their said policy they now insist that they cannot be held liable for the value of any of said cotton which had thus accumulated as set forth above.

In addition to the matters hereinbefore stated, respondent for a more specific answer to the cross-bill of the Delaware Mutual Safety Insurance Company and Thomas & Tracy, receivers, say:

They admit the delivery of five hundred bales of cotton
752 by Jones Bros. & Co. on or prior to Nov. 3, 1887, consigned to order, at Lowell, Mass., notify Tremont and Suffolk mills, but they deny that said cottons were sold by Jones Bros. & Co. before the same were delivered into the press. They say that the contrary is true; that said cottons were the property of Jones Bros.

& Co. when delivered into the press, and remained their property at least until the draft attached to the bill of lading was cashed by the Memphis bank. They are advised that said cottons remained and were the general property of Jones Bros. & Co. until the draft was paid, the bank holding title thereto only as security for the draft. In any event, they say that the rights of cross-complainants depend wholly upon the rights of Jones Bros. and Co., and that they are not liable to either said Jones Bros. & Co. or to
753 cross-complainants, either directly or through the liability of said C., V. & C. line, the liability on either ground being here fully denied, as is also the liability of the C., V. & C. line either to the consignees or the consignors under said bills of lading constructed in the light of the attending circumstances as hereinbefore stated.

Respondents admit the filing of the intervening petition in the U. S. circuit court for the southern district of Illinois (in the case in which said Thomas & Tracy were appointed receivers) by the Tremont & Suffolk mills in its own right and in the right of the insurer. They admit the said receivers notified the compress company of the filing of said intervening petition and required it to appear and defend the same, but deny that it refused to appear. The
754 fact is that defendant compress company, at or about the time it was first informed of the filing of said intervening petition, was also informed of the agreement between the petitioners and the receivers to the effect that no further steps should be taken under said petition until the litigation in the courts of Tennessee should have been ended, except such as were necessary to protect the rights of said intervening petitioners in the event of foreclosure sale by the reservation of a fund. Shortly after the decision of said case of Deming against The Merchants' Cotton Press & Storage Company, at the April term, 1891, of the supreme court of Tennessee, the respondent compress company, through its attorneys, commenced a correspondence with the attorneys of the receivers, Thomas and Tracy, giving said attorneys a full statement of the scope and results of the litigation in Tennessee
755 and asking them the status of the proceedings in said U. S. circuit court for the southern district of Illinois. It is true that respondent company was reluctant to undertake the defense of the case in another State, but whilst it was considering whether it would or would not do so it was suddenly informed by the filing of this bill and cross-bill and exhibits thereto attached that the receivers, from whom it had, as it is advised, the right to expect and demand every reasonable support, has made common cause with the adversaries of these respondents, and in consideration of the release of the line by them represented had agreed to adopt a course that they believed would and intended should result in fixing the loss on said compress company and the fire in.— companies
756 in which it held policies.

The statement in the document exhibited with the cross-bill to the effect that the liability of the C., V. & C. line had been practically established, making any further litigation on that point use-

less, is, as respondents believe, a mere pretence entered into between them, and the complainants abandoned all efforts to defend the C., V. & C. line in said United States circuit court for the southern district of Illinois, and agreed to appear in the courts of Tennessee, where the question was, as they believed, prejudiced. It was the purpose of the receivers by that arrangement to secure a release of themselves; themselves and said line to afford to the complainants the opportunity to litigate the question of the liability of the C., V. & C. line's liability in the Federal courts. It is apparent
757 that this course would never have been taken by the receivers except for the fact that they thereby secured a release to themselves, under an undertaking by which they agreed to combine and confederate with plaintiffs in the effort to saddle the loss on the respondent company and the fire companies. In other words, the said receivers not only deserted the compress company and its fire companies, to which it owed allegiance and support, but, by the agreement with its adversaries, entered actively into a confederation with the plaintiffs to enable plaintiffs to fix the liability on the compress company and its fire companies. Its voluntary appearance, no process having been served, only in this case is entered in furtherance of the scheme to release said line and fasten the loss on the respondent compress company and said fire companies.

758 Respondents submit that the only right of the plaintiffs to a recovery against the said compress company and the fire companies depends upon a *bona fide* litigation and a final adjudication therein of the liability of the C., V. & C. line. They further submit that the collusion and confederation between the plaintiffs and the said C., V. & C. line, whereby the latter not only abandons its defences, but also abandons its domicile, in order to come into a court of, to it, foreign jurisdiction and there admit its liability as a consideration for the cotemporaneous release of that same liability, is such palpable and conclusive evidence of bad faith toward said compress company and its fire companies as will and ought to repel it and any and all persons claiming under it from any benefit or advantage thereof. It does certainly, as respondents are ad-
759 vised, render impossible the procurement of a judgment by plaintiffs against the C., V. & C. line in a court of competent jurisdiction and in a cause in which the alleged liability of the C., V. & C. line is *bona fide* defended. The course of the C., V. & C. line has been such as to throw upon defendant compress company and said fire companies the whole burden of defending its liability in the effort to defend themselves; and these respondents submit that, inasmuch as their liability, if any, is simply to indemnify and save harmless the said C., V. & C. line, that no liability will be put upon them in favor of that line under the circumstances herein stated.

They are further advised that the right, if any, of the C., V. & C. line (through which complainants and cross-complainants
760 seek to recover against the defendant compress company and its fire companies) is to have such judgment as in equity it may be entitled to, to indemnify the said C., V. & C. line against

any judgment that may be recovered against it; that the recovery of any judgment whatever against the said C., V. & C. line is impossible by reason of the plaintiffs having released it from any and all liability. Respondents are advised that by said contract of May 24, 1887, said compress company's obligation, if any, was to indemnify and save harmless the C., V. & C. line, and are further advised and submit to the court that the release of the C., V. & C. line operates necessarily as a release of the compress company and its fire companies. The said line has not been damaged, inasmuch as it appears that the holders of the claim have released it
761 from all liability. Respondents are further advised and submit that it was well known both to cross-complainants and to said receivers, Thomas & Tracy, that the courts of Tennessee had declared the liability of the C., V. & C. line on its bills of lading here involved. It was therefore also well known to them that the C., V. & C. line by its own voluntary act transferred the litigation from the Federal court of Illinois to the courts of Tennessee; it inflicted, as far it was in its power to do so, a certain loss on said compress company and its fire companies, and respondents submit to the court that the said C., V. & C. line as the holder of the alleged contract of indemnity will not be permitted to recover in that contract under the circumstances.

16.

762 Respondents admit that the fire companies have declined and refused to pay the $210,224.37 required to be paid by the supreme court of Tennessee and to be held in reserve by the defendant compress company until the liability of the C., V. & C. line should have been determined and other questions necessary to a proper disposition of said fund should have been settled. Said fire companies submit that it will be time enough to pay this sum when such questions are settled.

17.

For a more particular answer to the cross-bill of Thomas & Tracy, as receivers of the C., V. & C. division of the Wabash, St. Louis & Pacific R. R. Co., they say they suppose it to be true that the said Thomas & Tracy were first appointed trustees and afterwards receivers on a bill to foreclose the trust deed made by the
763 Wabash, St. Louis & Pacific R. R. Co.; that said last-named company is a corporation formed by the consolidation of several other corporations and existing under the laws of the State of Missouri, Illinois, Indiana, and Ohio, but respondents require that all of the allegations in respect to the appointment of and qualifications of said Thomas & Tracy as such receivers be proved as alleged in the bill.

Respondents admit the execution of the contract of May 24, 1887, between the respondent compress company and the Cairo, Vincennes R. R. Co., as averred in said cross-bill; they say, however, upon information and belief, that there was at that

time no such corporation as the Cairo and Vincennes R. R. Co., and that the said contract is therefore void and of no effect. They admit that said contract by its terms required
764 the defendant compress company to carry insurance to the extent stated "in good and solvent companies." They say that the $301,750 of insurance held by the respondent compress company at the time of said fire was in good and solvent companies within the meaning and intent of said contract. Further answering, they say that if the liability of the C., V. & C. line shall be established that the said line, under the decree of the supreme court of Tennessee in said cause of Deming & Co., is entitled from said fire insurance companies to 85.55 % of the value of said cottons covered by its bills of lading, and that it has no claim in any event against the defendant compress company, except for 14.45 % thereof. Respondents deny that there was any combination, confederacy, or conspiracy between said defendant compress company and its
765 fire companies to prevent or defeat the collection of said fire policies. The whole agreement between them has long since been put in evidence in the cases already decided by the supreme court of Tenn., and will again be produced in evidence if necessary in this case.

18.

Respondents do not confine this answer as hereinbefore made to said cross-bills to the paragraphs hereof especially pointing to said cross-bills, but pray that the whole of this answer may be taken as a response to the original and amended bills and the several cross-bills herein filed against them and others.

And, having fully answered, respondents pray to be hence dismissed with their costs, etc.

Respondents, having now fully answered said original,
766 amended, and cross bills, do demur to the same, so far as they aver the liability of said C., V. & C. line and the defendant compress company and the consequent primary liability of their defendants, upon the grounds following, to wit:

First. It appears upon the face of the said bills that there was no such corporations as the Cairo & Vincennes Railroad Company, in whose behalf the said contract of May 24, 1887, purports to have been executed by the receivers, Anthony J. Thomas and Chas. E. Tracy.

The said contract is therefore void.

Second. The said receivers had no power to make said contract, and the same is on that account void.

Third. The liability of the defendant compress company depends upon the liability of the C., V. & C. line.

767 The bills on their face fail to show liability on the part of that line because—

a. The said receivers, Thomas & Tracy, had no power to locate an agent at Memphis, Tenn., and there to acknowledge receipt of and in consequence to fix liability upon the C., V. & C. line for cottons delivered to said compress company. The bills show on their face

that there was no delivery of said cottons to said C., V. & C. line or its receivers, and that all the acts of said receivers in issuing said bills of lading, as well as making the contract of May 24, 1887, were *ultra vires* and void.

b. The bills of lading of the C., V. & C. line exhibited with the bills of complaint contain in the body thereof a clause ex-
768 onerating the said line from liability for a loss by fire, and the complainants failing to allege negligence on the part of said line, its agents, employees, or servants, the said clause is sufficient to exonerate the line from liability. The said C., V. & C. line not being liable, the defendants, whose liability depends upon that of the C., V. & C. line, are also not liable.

c. The said C., V. & C. line is not liable, and consequently the defendants are not liable for the further reason that said receivers, Thomas and Tracy, had no power to make such through contracts of affreightment as are evidenced by said bills of lading, it appearing upon the face of the bills that the said receivers undertook through their agent at Memphis, Tenn., and in respect of cottons in a compress at Memphis, Tenn., to make contracts for
769 through transportation and to assume the liability of a common carrier in respect thereto, the said cottons being about one hundred and fifty miles from the nearest point of said C., V. & C. line and not appearing to have been actually or constructively delivered to it by the facts stated in the bills of complaint.

Fourth. The said C., V. & C. line, in whose right the complainants sue, is entitled, if at all, to recover against the defendant compress company on the said contract of May 24, 1887.

That contract, if binding, is one of indemnity only, obligating said compress company to carry sufficient insurance to protect the said C., V. & C. line against liability for a loss by fire. The said line has suffered no damage by reason of the alleged breach of that obligation, it appearing that the complainants have released it
770 from any and all liability on account of the loss of said cottons. It can, therefore, have no recovery over against said compress company.

Fifth. Plaintiffs' rights of recovery, if any, are against the C., V. & C. line alone. It is for that line if subjected to liability for the loss of said cottons and after it shall have been subjected to seek its remedy over against defendant compress company and its fire companies upon said contract of May 24, 1887. It cannot in this proceeding avail itself of such right of recovery over.

Sixth. The said C., V. & C. line has lost and forfeited all right of recovery over upon said contract of May 24, 1887, if any it had, by reason of the fact, apparent on the face of plaintiffs' pleadings, that it has confederated and combined with the plaintiffs to aid
771 the plaintiffs as far as possible to fix liability on the defendant compress company and its fire companies in consideration of a release by the plaintiffs of all claims and demands upon and against said C., V. & C. line and its receivers.

If said C., V. & C. line, by its voluntary appearance in this suit, entered in furtherance of the scheme aforesaid, shall be subjected to

liability, it will under the circumstances appearing be denied any recovery over against the defendant compress company and its fire companies.

Seventh. The above fourth ground of demurrer, whilst directed to the bills and cross-bills generally, is more specifically pointed to the cross-bills by the Delaware Mutual Safety Insurance
772 Company and by Thomas and Tracy, receivers, for the use of said company.

Eighth. To the cross-bill filed by Thomas and Tracy, receivers of the C., V. & C. line, they assign, in addition to those already stated, the following grounds of demurrer, to wit:

a. The said cross-bill fails on its face to show any ground of recovery whatever in respect of the fifty bales of cotton belonging to Hooper and Buffington and the one hundred bales belonging to B. H. Coates & Co.; neither Hooper and Buffington nor said Coates & Co. are parties to this proceeding, and it appears upon the face of the pleadings that their rights have been fully disposed of in the cases already determined by and in the supreme court of Tennessee.

Neither said Hooper and Buffington nor said Coates & Co.
773 are seeking any relief against the C., V. & C. line or its receivers thereof.

b. Said cross-bill denies delivery of said cottons to said receivers, and generally denies all grounds of recovery on the part of the original or other cross-complainants against them, the said receivers; it therefore does not and cannot aver or show any ground of recovery over on the part of the said receivers against the defendant compress company and its fire companies. The said receivers cannot maintain a cross-bill against the defendant compress company and its fire companies seeking recovery over against the latter company if recovery shall be had against them.

And now, having fully answered, respondents pray to be hence dismissed with their costs, etc.

TURLEY AND WRIGHT,
774–784 METCALF AND WALKER,
Sols. for Respondents.

* * * * * * *

785 *Copy of Decree Appointing Receivers. Wabash, St. Louis & Pacific R'y Co. et al. Filed Feb'y 2, '92.*

Circuit Court of the United States, Southern District of Illinois.

WEDNESDAY, *April 22nd, A. D.* 1885.

Present: Hon. Sam'l H. Treat, district judge.

ANTHONY J. THOMAS & CHAS. EDWARD TRACY, Trustees,
vs.
THE WABASH, ST. LOUIS & PACIFIC R'Y CO. and SOLON HUMPHREYS and THOMAS E. TUTT, Receivers, etc.

And now, on this day, come the complainants and move the court for the appointment of receivers herein, according to the

786 prayer of their bill, and the defendants appearing by Messrs. Greens, Bennett & Humphrey, the said motion being submitted to the court upon the bill and exhibit thereto, and the court having heard argument thereon and being sufficiently advised in the premises, it is ordered and decreed by the court that the said Anthony J. Thomas and Chas. Edward Tracy be, and they are hereby, appointed receivers herein to take possession of all and singular the line of railroad extending from Danville to St. Francisville, in the State of Illinois, and from Vincennes, in the State of Indiana, by way of said St. Francisville to Cairo, in the State of Illinois, now known and designated in complainants' bill as the Cairo division of the said Wabash, St. Louis and Pacific railway, and the appurtenances of each of them, and all rolling stock, equipment, material, and supplies which were on said lines on the first day of October, A. D. 1881,
787 or which were by the said defendants at any time thereafter acquired, used, or *or* held for the operation of said line of rail road or any part thereof, with all moneys, assets, leases, franchises, and all other rights and property whatsoever belonging or appertaining to said line of railroad, wherever the same may be, and all rights, franchises, leases, or other species of property whatsoever acquired by the said defendant company, by means of the consolidation of the stock, property, and franchises of the Cairo and Vincennes Railway Company, the St. Francisville and Lawrenceville Railroad Company, and the Danville and Southwestern Railroad Company with the stock, property, and franchises of the said defendant company as set out in complainants' bill with power and
788 authority to operate and control said railroad and to exercise all the franchises of the said defendant in this regard; and it is further ordered by the court that the said defendants or whoever may have possession thereof within the time specified in the order of the circuit court of the United States for the eastern district of Missouri, made on the 16th day of April, 1885, in the cause of the Central Trust Company of New York *et al. vs.* The Wabash, St. Louis & Pacific Ry. Co. *et al.*, and filed herein, deliver all the property aforesaid, real or personal, and all evidences of title thereto, maps, plats, charts, and profiles relating to said railroad line; and all equitable interest, things in action and other effects, belonging or appertaining to said line of railroad in the same condition that they were at the time of exhibiting said bill of complaint in this
789 cause, except as far as necessarily changed in the proper management of said line of railroad and that said defendants in like manner delivered over all books, vouchers, and other evidences relating thereto.

And it is further ordered that the said receivers keep a full and accurate account of all their acts and doings as such receivers, and that they report the same to this court from time to time as they may hereafter be directed by the court and until the further order of the court in that behalf, to employ all necessary agents and servants to properly run, operate, and manage the said railroad and its affairs, and the said receivers are hereby empowered to employ

such counsel and attorneys to manage their legal affairs and advise them touching their rights as may be necessary, and from time to time use and pay out on proper vouchers any money that
790 may come to their hands as such receivers from the said defendants or from the earnings of said roads for any and all the purposes stated in this order; if the said Cairo division during the period of the receivership hereby established, shall fail to earn a sufficient revenue to pay for its operation, maintenance, preservation, or other expenses, this order shall not be construed as in any way authorizing the imposition of such deficiencies or any part thereof upon any other proposition of said Wabash, St. Louis & Pacific Railway, as a charge or a lien thereon, and it appearing to the court that the said Anthony J. Thomas and Chas. Edward Tracy, herein appointed receivers, are the trustees under the mortgage set out in the complainant's bill and sought to be foreclosed, it is ordered that they be not required to give bond.

791 Circuit Court of the United States, Southern District of Illinois.

I, James T. Jones, clerk of the circuit court of the United States in and for the southern district of Illinois, do hereby certify that the foregoing is a true and complete copy of the decree entered April 22, 1885, appointing Anthony J. Thomas and Charles Edward Tracy receivers in a certain cause wherein Anthony J. Thomas and Charles Edward Tracy, trustees, &c., are complainants and The Wabash, St. Louis & Pacific Railroad Company *et al.* are defendants, as the same appears of record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at Springfield, in said district, this twelfth day of January, A. D. 1892.

792 [SEAL.] JAMES T. JONES, *Clerk.*

Copy of Order Authorizing Receivers to Use Title, C., V. & C. Line. Filed Feb'y 2, '92.

In the Circuit Court of the United States, Southern District of Illinois.

WEDNESDAY, *June 3rd*, 1885.

Present: Hon. Samuel H. Treat, district judge.

ANTHONY J. THOMAS & CHARLES EDWARD TRACY, Trustees, &c.,
versus
THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY and Solon Humphreys and Thos. E. Tutt, Receivers, &c. } In Equity.

And now, on the 3rd day of June, A. D. 1885, come Anthony J Thomas and Charles Edward Tracy, receivers of the Cairo division of

the Wabash, St. Louis and Pacific railway, and present to
793 the court a petition asking authority to better the equipment of said "Cairo, Vincennes and Chicago line," and also for authority to transact the business of said division under said title of "Cairo, Vincennes & Chicago line," and the court having heard argument and being sufficiently advised in the premises, it is ordered and decreed by the court that said receivers be, and they hereby are, authorized to better the equipment of said division, "Cairo, Vincennes & Chicago line," or initial the same "C., V. & C.," and also that they transact the business of carrying freight and passengers under the title of "Cairo, Vincennes & Chicago line."

Circuit Court of the United States, Southern District of Illinois.

I, James T. Jones, clerk of the circuit court of the United
794–848 States in and for the southern district of Illinois, do hereby certify that the foregoing is a true and complete copy of an order entered June 3rd, 1885, in a certain cause wherein Anthony J. Thomas and Charles Edward Tracy, trustees, &c., are complainants and The Wabash, St. Louis & Pacific Railway Company *et al.* are defendants, as the same appears of record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at Springfield, in said district, this 12th day of January, A. D. 1892.

JAMES T. JONES, *Clerk.* [SEAL.]

849 *Rates on Cotton.*

It has been agreed that, taking effect Monday, September 19th, 1887, the rates on cotton will be as follows:

Uncompressed, with privilege to carrier of compressing—

From the points named below to New York, with the usual differences to other seaboard cities:

Memphis, Tenn	50½	cents per 100 lbs.
St. Louis, Mo	46½	" " "
Hannibal, Mo	46½	" " "
East St. Louis, Ill	42½	" " "
East Hannibal, Ill	42½	" " "
Cairo, Ill	44½	" " "
Mount Vernon, Ill	42½	" " "
Shawneetown, Ill	44¼	" " "
Evansville, Ind	42½	" " "
850 Louisville, Ky	41½	cents per 100 lbs.
Jeffersonville, Ind	40½	" " "
New Albany, Ind	40½	" " "
Cincinnati, Ohio	36½	" " "
Chicago (on compressed cotton)	27	" " "

The cost of compressing at Memphis and Cairo will be 10 cents and at other points not to exceed 12½ cents per 100 lbs.

The Cairo line may accept as their proportion of through rate on

Texas and Arkansas cotton coming to Cairo compressed 32 cents per 100 lbs. Cairo to New York.

The river and rail lines are to make the all-rail rate from Memphis, allowing as the divisions to be paid for boat rate, transfer, and insurance as follows:

Memphis to Cairo	10	cents per 100 lbs.
Memphis to Evansville and Mt. Vernon, Ind.	12	" " "
Memphis to Cincinnati	14	" " "

851 The rail lines east from the Ohio River points above named to take as their divisions on compressed cotton from Memphis:

Cairo to New York	30½	cents per 100 lbs.
Evansville to New York	28½	" " "
Cincinnati to New York	26½	" " "

ALBERT FINK, *Chairman.*

G. R. BLANCHARD,
Western Vice-chairman.

852 *Proofs of Loss and Agreement with Phenix Ins. Co. Filed February 23rd*, 1892.

To the Phenix Insurance Company of Brooklyn:

STATE OF TENNESSEE, }
County of Shelby. }

Be it known that on this twenty-eighth day of January, A. D. 1888, before me, Hunsdon Carey, a notary public duly commissioned and sworn, residing in the city of Memphis, in the county and State aforesaid, personally appeared S. R. Montgomery, general manager of and for the Merchants' Cotton Press & Storage Co. of Memphis, Tennessee, who, being duly sworn, deposes and says that the following statement and that the papers therein referred to and signed with his own hand contained a particular, just, and true account of its loss in the words and figures following, to wit:

1. That on the fourth day of November, A. D. 1887, the
853 Phenix Insurance Co., by its policy of insurance No. 11426, issued by Green, Montidonico & Co., its agent at Memphis, in the State of Tenn., did insure the party herein and therein named against loss or damage by fire to the sum of ten thousand dollars—

"On all cotton in bales received by them as agents for the benefit of railroads, transportation lines, or owners in the boundaries of the Merchants' Cotton Press & Storage Company's West Navy Yard compress, situate and bounded as follows: East by the west line of Fulton street, west by the Mississippi river, north by Auction street, and south by Market street, Memphis, Tenn.

The liabilities of the insurers is to begin on the receipt of said cotton on the premises of the assured as herein described for compressing, and is to cease and terminate when removed from the plat-

forms of the Merchants' Cotton Press & Storage Company for
854 transportation.

The assured are allowed the privilege for mechanics to make all necessary alterations and repairs on said premises, and also allowed to run extra hours as necessities of business may require, and are allowed to keep a suitable stock of oil and tallow for lubrication of machinery and for use in covered hand lanterns.

It is understood and agreed that in case of loss under this policy this company shall be liable only for such proportion of the whole loss as the amount of the policy bears to the cash value of the whole property herein described at the time of the fire.

Notice of other insurance waived—"

For the term of three months from the fourth day of No-
855 vember, A. D. 1887, to the fourth day of February, A. D. 1888.

II. That in addition to the amount covered by said policy of said company there *was* two hundred and ninety-one thousand seven hundred and fifty dollars other insurance made thereon, as specified in the accompanying Schedule A, showing the name of each company and amounts of each policy, besides which there was no other insurance thereon effected by the assured.

III. That the actual cash value of the property now admitted to be insured to the sum of fifty-two thousand four hundred and seventy-two and $\frac{26}{100}$ dollars at the time immediately preceeding the fire, as will appear by the annexed Schedule B and exhibits
856 numbered 1 to 14, showing a full and accurate description of each kind of property and the value of the same, with the damage or loss on each stated separately.

IV. That the property now admitted to be insured belonged to Patterson, Muller & Co., Jones Bros. & Co., Vincent, Airheart & Co., and the De Sota Oil & Fertilizing Co.

V. That the building insured or containing the property destroyed or damaged was occupied in its several parts by the parties hereinafter named and for the following purposes, to wit: By the Merchants' Cotton Press & Storage Co. as a cotton compress and for no other purposes whatever.

VI. That on the 17th day of November, A. D. 1887, a fire occurred, by which the property now admitted to be insured was injured or destroyed to the amount of fifty-two thousand four hundred and seventy-two and $\frac{26}{100}$ dollars, as set forth in this statement
857 and the several schedules and papers hereunto annexed, which the deponent declared to be a just, true, and faithful account of its admitted loss so far as he has been able to ascertain the same, and the insured now claims of the Phenix Insurance Company the sum of seventeen hundred and thirty-eight and $\frac{93}{100}$ dollars.

VII. That the fire originated from causes unknown to the assured, but it is believed to have been an act of incendiarism; and the said depone-t further declares that the said fire did not originate by any act, design, or procurement on its part or in consequence of any fraud or evil practice done or suffered by it, and that nothing has been done by or with its privity or consent to violate the conditions

of insurance or render void the policy aforesaid, and that it will furnish, whenever required by said company, full particulars
858 exhibiting the construction of the building containing the property insured, its dimensions and condition at the time of the said fire, and such additional information concerning said insured property, the damage thereto and the insurance thereon, as well by means of books of accounts and other vouchers furnished as by replies to interrogator-s made, as shall be required by said company.

VIII. Addendum. Be it remembered that the Merchants' Cotton Press & Storage Company of Memphis, Tennessee, in making these proofs of loss against the fire insurance companies enumerated in Schedule A, annexed hereto, namely, for ten hundred and thirty-eight (1038) bales of cotton, valued as above set forth, burned in the West Navy Yard compress (sometimes designated as No. 4) on the 17th day of November, 1887, submits the said proofs as representative of all claims which up to this date have been pre-
859 sented against it, and right of claimants admitted, rights of all other claimants being denied for any other part of the whole loss of 13,966 bales of cotton, as set forth in the annexed Schedule "C," but in the event of litigation in respect of said loss (the said Merchants' Cotton Press & Storage Co. hereby stipulating and agreeing to defend all suits which may be instituted against it with the best legal talent attainable, to the final termination thereof in the courts of last resort) and the adjudication by said courts fixing the liability of the Merchants' Cotton Press & Storage Co. to the owners (at the actual cash market value on the 17th day of November, 1887) the Merchants' Cotton Press & Storage Co. then in that event reserves the right to make additional claims on the said insurance companies in accord with and up to the judgements entered against it in the said courts of last resort; and in the event of settlement of any disputed claims by compromise, by concurrent action of the
860 Merchants' Cotton Press & Storage Co. and the insurance companies or a committee representing them, the Merchants' Cotton Press & Storage Company in that event also reserves the right to make claims on the insurance companies therefor on the basis of five-twelfths of the amount paid on said compromise settlement; and the Phenix Insurance Company, in the acceptance of these proofs and payment of the claim herein made, thereby binds itself to recognize and to pay *pro rata* such additional claims, whether by judgment or compromise, rendered or made as aforesaid, not exceeding the remainder due under its policy.

Witness my hand at Memphis, Tenn., this twenty-eighth day of January, A. D. 1888.

S. R. MONTGOMERY,
Gen'l M'n'g'r Merchants' Cotton Press & Storage Company.

861 Subscribed and sworn to before me this twenty-eighth day of January, A. D. 1888.

HUNSDON CARY,
[SEAL.] *Notary Public.*

STATE OF TENNESSEE, }
County of Shelby. }

I, Hunsdon Cary, a notary public residing in Memphis, most contiguous to the property hereinbefore described, hereby certify that I am not concerned in the loss or claim above set forth, either as a creditor or otherwise, or related to the insured or sufferers; that I have examined the circumstances attending the fire or damage as alleged, and that I am well acquainted with the character and circumstances of the insured, and do verily believe that they have by misfortune and without fraud or evil practice sustained loss and damage on the property insured to the amount of fifty-two thousand four hundred and seventy-two and $\frac{26}{100}$ dollars,
862–1120 as by them hereinbefore set forth.

In testimony whereof I have hereunto set my hand and official seal this twenty-eighth day of January, A. D. 1888.

[SEAL.] HUNSDON CARY,
Notary Public.

* * * * * * *

1121 EXHIBIT A.

MEMPHIS, TENN., *January 23rd*, 1892.

Statement Showing Collections by Merchants' Cotton Press and Storage Company on Account of Insurance on Cotton in West Navy Yard Press, Burned November 17th, 1887.

Name of company.	Date of payment.	Amount.	
Ætna F. & M. Ins. Co.	May 4, '88	$173 89	$173 89
Capital City Ins. Co.	June 5, '88	434 73	434 73
Central Mnfrs.' Ins. Co.	May 4, '88	608 63	608 63
Citizens' Mut. Ins. Co.	May 4, '88	434 73	434 73
Commercial F. Ins. Co.	March 5, '88	434 73	798 45
	Sep. 1, '91	363 72	
Commonwealth Mut. Ins. Co.	March 5, '88	434 73	434 73
Continental Ins. Co.	March 5, '88	2,608 40	4,790 69
	Aug. 18, '91	2,182 28	
Council Bluffs Ins. Co.	March 5, '88	347 79	347 79
East Texas F. Ins. Co.	March 5, '88	434 73	434 73
Fire Association	March 5, '88	1,738 93	3,193 79
	Aug. 24, '91	1,454 86	
1122 German-American Ins. Co.	March 5, '88	260 84	260 84
Germania Ins. Co.	May 4, '88	869 47	1,596 90
	Aug. 18, '88	727 43	
German F. Ins. Co.	May 4, '88	173 89	173 89
Hope Ins. Co.	May 4, '88	1,738 93	3,193 81
	Aug. 18, '91	1,454 88	
Hope Ins. Co.	July 29, '88	217 36	217 36
Indiana Ins. Co.	May 4, '88	347 79	347 79
Liverpool L. & G. Ins. Co.	May 4, '88	6,086 26	11,178 26
	Aug. 18, '91	5,092 00	
Lumbermen's & Mnfrs.' Ins. Co.	May 4, '88	434 74	434 74
Mutual F. Ins. Co.	May 4, '88	8,694 66	15,968 95
	Aug. 24, '91	7,274 29	
Milwaukee Mut. F. Ins. Co.	May 4, '88	434 73	434 73
Manfrs.' Mut. F. Ins. Co.	May 4. '88	434 73	434 73

Statement Showing Collections, &c.—Continued.

Name of company.	Date of payment.	Amount.	
Mut. Fire Ass'n	May 4, '88	8434 73	8434 73
Millers' Mut. Ins. Co	May 7, '88	434 73	434 73
Mnfrs.' F. Ins. Co	May 4, '88	173 89	173 89
Millers' Nat. F. Ins. Co	July 17, '88	434 73	434 73
Mut. F. Ins. Co.	May 4, '88	869 47	869 47
Miss. V. Mnfrs.' M. Ins. Co	May 4, '88	869 47	869 47
Mnfrs.' Mer. & Mut. Ins. Co	June 6, '88	608 63	608 63
Mut. Union Ins. Co.	May 4, '88	434 73	434 73
1123 Miss. Home Ins. Co.	May 4, '88	260 84	479 06
" " " "	Oct. 6, '91	218 22	
Minneapolis Mf. Ins. Co.	May 4, '88	434 73	434 73
National F. Ins. Co	May 4, '88	869 47	1,596 89
" " "	Aug. 18, '91	727 42	
New Orleans Ins. Co.	May 4, '88	869 47	1,596 90
" "	Aug. 18, '91	727 43	
Oshkosh Mut. F. Ins. Co.	May 4, '88	434 73	434 73
Ohio Valley Ins. Co.	May 4, '88	173 90	173 90
Phenix Insurance Co.	May 4, '88	6,086 26	6,086 26
People's Ins. Co	July 5, '88	173 90	173 90
People's Fire Ins. Co	May 4, '88	260 84	260 84
Royal Ins. Co	May 4, '88	6,086 26	11,178 26
" "	Aug. 18, '91	5,092 00	
Reliance Mut. Ins. Co.	May 4, '88	434 73	434 73
Security Fire Ins. Co	May 4, '88	217 37	217 37
Standard F. Ins. Co.	May 4, '88	173 89	173 89
Wisconsin Mut. F. Ins. Co.	May 4, '88	434 73	434 73
Western Mnfrs.' Mut. F. Ins. Co.	May 4, '88	1,043 26	1,043 36
Western Fire & M. Ins. Co.	May 4, '88	260 84	260 84
M. C. P. & S. Co		3,348 28	3,348 28
		878,483 21	878,483 21

J. M. FOWLKES, *Secretary.*

1124 EXHIBIT B.

MEMPHIS, TENN., *Jan. 23rd*, 1892.

Statement Showing Collections by Merchants' Cotton Press and Storage Company on Account of Legal Fees Arising from Litigations Caused by Cotton Fire at Press No. 4, Nov. 17th, 1887.

Name of company.	Date of payment.	Amount.	
Etna F. & M. Ins. Co	Aug. 18, '88	82 76	82 76
Capital City Ins. Co.	July 30, '88	6 90	6 90
Central Mnfrs.' Ins. Co	Oct. 1, '88	9 67	9 67
Citizens' Mutual Ins. Co	July 26, '88	6 90	6 90
Commercial F. Ins. Co.	July 24, '88	6 90	20 71
" " "	Sept. 1, '91	13 81	
Commonwealth Mut. Ins. Co.	Aug. 18, '88	6 90	6 90
Continental Ins. Co.	July 30, '88	41 43	124 28
" "	Aug. 18, '91	82 85	
East Texas F. Ins. Co.	July 25, '88	6 90	6 90
Fire Association	March 28, '88	27 62	82 86
"	Aug. 24, '91	55 24	

Statement Showing Collections, &c.—Continued.

	Name of company.	Date of payment.	Amount.	
	German-American Ins. Co.	Aug. 4, '88	$4 14	$4 14
1125	Germania Fire Ins. Co.	July 24, '88	13 81	41 42
	" " " "	Aug. 18, '91	27 61	
	German Fire Ins. Co.	July 30, '88	2 76	2 76
	Home Ins. Co.	July 24, '88	27 62	82 86
	" "	Aug. 18, '91	55 24	
	Indiana Ins. Co.	Oct. 5, '88	5 52	5 52
	Liverpool L. & G. Ins. Co.	July 30, '88	96 67	290 00
	" " "	Aug. 18, '91	193 33	
	Lumbermen's — Mnfrs.' Ins. Co.	July 26, '88	6 90	6 90
	Mutual Fire Ins. Co.	Sept. 21, '88	138 09	414 25
	" " "	Aug. 24, '91	276 16	
	Milwaukee Mut. F. Ins. Co.	Aug. 4, '88	6 90	6 90
	Mnfrs.' Mut. F. Ins. Co.	Aug. 15, '88	6 90	6 90
	Mutual F. Ass'n.	July 26, '88	6 90	
	Millers' Mut. Ins. Co.	July 26, '88	6 90	6 90
	Mnfrs.' F. Ins. Co.	Sept. 27, '88	2 76	2 76
	Millers' National	July 24, '88	6 90	6 90
	Mutual Fire Ins. Co.	Ap'l 4, '88	13 81	13 81
	Miss. V. Mnfrs.' Mut. Ins. Co.	July 30, '88	13 81	13 81
	Mnfrs.' & Mer. Mut. Ins. Co.	July 25, '88	9 67	9 67
	Mut'l Union Ins. Co.	July 26, '88	6 90	6 90
	Miss. Home Ins. Co.	Oct. 10, '88	4 14	12 42
	Miss. Home Ins. Co.	Oct. 6, '91	8 28	
1126	Minn. Mut. F. Ins. Co.	Aug. 15, '88	6 90	6 90
	Nat'n'l F. Ins. Co.	July 30, '88	13 81	41 42
	" " "	Aug. 18, '91	27 61	
	New Orleans Ins. Co.	July 24, '88	13 82	41 44
	" " "	Aug. 18, '91	27 62	
	Oshkosh Mut. F. Ins. Co.	Aug. 21, '88	6 90	6 90
	Phenix Ins. Co.	July 30, '88	96 68	96 68
	People's "		8 28	8 28
	People's Fire Ins. Co.	Sept. 28, '88	4 14	4 14
	Royal Ins. Co.	Sept. 21, '88	96 68	290 01
	" "	Aug. 18, '91	193 33	
	Reliance Mut.	July 30, '88	6 90	6 90
	Standard Fire Ins. Co.	Oct. 1, '88	2 76	2 76
	Wis. Mutual F. Ins. Co.	Aug. 4, '88	6 90	6 90
	Western Mnfrs.' M. F. I. Co.	July 26, '88	16 56	16 56
	Western Fire & Marine	Oct. 17, '91	4 14	4 14
	German Ins. Co.	Aug. 17, '91	5 52	5 52
			$1,747 15	$1,748 15

J. M. FOWLKES, *Secretary.*

1127 EXHIBIT "C."

MEMPHIS, TENN., *Feb. 27th*, 1892.

Statement of Amounts Paid by Merchants' Cotton Press and Storage Co. on Judgments Rendered in Supreme Court of Tennessee.

Date of payment.		Amount.	
Aug. 15th, '90	Judgment, favor Coates & Co.:		
	Judgment	$3,109 14	
	Interest and costs	211 20	
			3,320 34
July 27th, '91	Tremont & Suffolk mills	516 97	
	R. H. Deming & Co., L., N. O. & T	2,083 59	
	Interest on above	537 01	
			3,137 57
	R. H. Deming & Co., N. N. & M. V	732 23	
	Whitfield mills	713 20	
	Interest	298 48	
			1,743 91
	Hooper & Buffington	332 50	
	Interest	68 66	
			401 16
Aug. 11th, '91	Warren Mnfg. Co., L., N. O. & T	766 94	
	Interest	160 41	
			927 35
	Geo. C. Nightengale, tr. N. N. & M	946 62	
	Interest	198 00	
			1,144 62
1128–1130	Jno. Collins & Son, N. N. & M. V	1,123 75	
	Interest	235 05	
			1,358 80
Aug. 31st, '91	Amount refunded to insurance fund under supreme court decree	$3,348 28	
	And interest	703 13	
			4,051 41
Sept. 25, '91	Cost in suit of R. H. Deming & Co. *et al*		680 45
			$16,765 61

Yours truly,

MERCHANTS' COTTON PRESS AND STORAGE CO.,
By J. M. FOWLKES, *Sec'y.*

* * * * * * *

1131 EXHIBIT "G."

MEMPHIS, TENN., *Aug. 18th*, 1891.

Messrs. Taylor & Carroll, att'ys-at-law, Memphis, Tenn.

1132 GENTLEMEN: The M. C. P. & S. Co. has received a letter, of which the following is a copy, to wit:

WHEELING, W. VA., *Aug. 12th*, 1891.

Merchants' Cotton Press & Storage Co., Memphis, Tenn.

GENTLEMEN: We have your circular letter, also decree of supreme court of Tennessee in R. H. Deming & Co. and sundry other parties *versus* Merchants' Cotton Press and Storage Co. *et al.*

In your circular letter you demand of this Co. $145.48 for loss, with interest from Feb'y 17th, 1888, and $5.52 fees.

In reply would say that we are perfectly satisfied to pay the loss with $145.48 and the fees, but we do not consider ourselves liable for any interest whatever.

1133 In your receipt for $173.89, loss on one thousand thirty-eight bales of cotton, dated April 10th, 1888, you will find that this company had waived no rights under its contract, and we claim under our policy that we are not liable for any loss until proper proofs are furnished, and therefore no interest can be added for any time previous to the date of such proof.

We have offered to settle this loss before through our adjuster, Mr. Chas. E. Carroll, of St. Louis, and we now again offer to settle the whole matter in order to get it off our books and make you the following proposition:

We are willing to pay you cash for the balance of our policy, with $826.11 (having already paid $173.89), for a full receipt
1134 and return of our policy No. 25777 and the discharge of our liability whatever under said policy.

In addition to this we are willing to pay our share of the fees, *are* herewith enclose our check for $5.52 in payment of same.

As we are no party to the suit and cannot be made parties to any suit, according to your receipt of April 10, 1888, previously mentioned herein, we are not subject to the mandate of the court, and consequently no interest can be tacked on any claim under said policy No. 25777.

Yours, very respectfully,

GERMAN FIRE INSURANCE CO.,
By F. REISTER, *Sec'y.*

As the attorneys for the compress Co. and the other fire
1135 companies involved in the loss of cotton by the fire of Nov. 17th, 1887, in the Navy Yard compress, we think that the proposition made by the German Fire Ins. Co. should be accepted, and that a like settlement should be made, if practicable, with any other fire company standing in the same situation with the German.

The chief question to be stated to you as material to the determination of the question submitted is that shortly after the fire about $225,000 in value of the fire insurance companies entered into an arrangement by which they are in effect bound by the results of the litigation against the compress company. The remaining fire companies, amounting to about $75,000, declined to
1136 enter into this arrangement, but paid the *pro rata* then immediately demanded of them, saying, however, that they did not admit the sufficienc-es of the preliminary proofs submitted and waived no right or defence by so doing.

We enclose herewith a printed copy of the circular letter recently issued by the compress Co. to the fire companies, from which you will get a list of all the fire companies involved in the loss, together with the residence of each. The companies that declined

to enter into the arrangement aforesaid with the compress are those whose policies are small, ranging from $1,000 to $2,500, and the residences of which are very widely scattered, some being in West Va., some in Wis., some in
1137 Alabama, etc. None of these companies are or can be brought before a Tennessee court, they having no agent upon whom process can be served, and we confidently think that if the entire balance of the principles of their policies can be had such a settlement would be an advantageous one for all other parties concerned. The difficult question for us — where the loss that would be thus incurred should fall. So far as concerns the decrees procured by you for your clients at the last term of the supreme court against the N. N. & M. V. Co. and the L., N. O. & T. R'y Co., no part of the loss accruing from such a compromise would fall upon them, but the uninsured owners (Hooper and Buffington and Coates & Co.) would suffer their *pro rata* share
1138–1164 of the loss thus incurred. In respect of the C., V. and C. cottons, it would seem that the loss suffered by such a compromise would fall on the C., V. & C. road, if you succeed in fixing the liability of that road. If that is not done and the fire insurance fund reserved by the decree at the last term is to be appropriated to the other parties interested as decreed, the possibilities of the matter becomes so indefinite as to almost baffle even reasonable conjecture.

We submit the letter of the German Fire Ins. Co. for your consideration.

Yours, truly, METCALF & WALKER.

Ex. G.

1165 *Final Decree and for Appeal. Entered March 23rd*, 1892.

INSURANCE COMPANY OF NORTH AMERICA OF PHILADELPHIA *et al.*
vs.
THE DELAWARE MUTUAL SAFETY ASSURANCE COMPANY *et al.*

This cause came on to be heard (before Leopold Lehman, duly elected as special chancellor in the place of the Hon. William D. Beard, chancellor, who was incompetent to hear it by reason
1166 of having been of counsel) upon the pleadings, amended pleadings, proofs, and stipulations of counsel filed herein, and was argued for the plaintiffs by Julius A. Taylor and William H. Carroll, for the receivers of the Cairo division of the Wabash and Pacific R'y Co. and the N. N. & M. V. Co. and the C., O. & S. W. R'y Co. by Mr. Holmes Cummins, for the compress company and the fire insurance companies by Mr. S. P. Walker and T. B. Turley, and after full consideration had the court is of opinion that the plaintiffs and the cross-plaintiffs, the marine insurance companies whose policies covered cotton under the bills of lading of the C., V. & C. line, are severally entitled to judgments against Anthony J. Thomas and Charles E. Tracy, receivers, except the

Delaware Insurance Company, and that it is entitled to a
1167 ratable proportion of the fund, credits, and property provided for the indemnity of the carrier.

Wherefore the court is pleased to order, adjudge, and decree:

I.

That the Insurance Company of North America of Philadelphia have and recover of Anthony J. Thomas and Charles E. Tracy, receivers, sixty-seven hundred and ninety-one dollars and fifty-eight cents, the value of one hundred and fifty bales of cotton marked MADE, with interest from the 17th day of November, 1887, which is the farther sum of seventeen hundred and sixty-six dollars and eighty-one —, making the sum of eighty-five hundred and fifty-eight dollars and thirty-nine cents.

II.

1168 That the Atlantic Mutual Insurance Company of New York have and recover of Anthony J. Thomas and Charles E. Tracy, receivers, the sum of twenty-four hundred and sixty-two dollars and twenty-two cents, the value of fifty bales of cotton marked DOXO, and the farther sum of six hundred and forty dollars and seventeen cents interest thereon, making the sum of thirty-one hundred and two dollars and thirty-seven cents.

III.

That the Providence Washington Insurance Company have and recover of Anthony J. Thomas and Charles E. Tracy, receivers, the sum of five thousand and three dollars and twenty-four cents, the value of one hundred bales of cotton marked HORN, together with thirteen hundred dollars and eighty-four cents, interest
1169 thereon, making the sum of sixty-three hundred and four dollars and twelve cents.

IV.

That the Phenix Insurance Company have and recover of Anthony J. Thomas and Charles E. Tracy, receivers, the sum of one hundred and thirty-seven thousand eight hundred and twenty dollars and seventy-four cents, the value of the lots of cotton enumerated as composing the twenty-eight hundred and four bales of cotton destroyed in the press by the fire of the 17th of November, 1887, and particularly enumerated on page eight of the original bill of complaint herein, with interest from the said 17th day of November, 1877, which is the farther sum of thirty-five thousand eight hundred and thirty-three dollars and thirty-nine cents,
1170 making the sum of one hundred and seventy-three thousand six hundred and fifty-four dollars and thirteen cents.

V.

That the Phenix Insurance Company have and recover of Anthony J. Thomas and Charles E. Tracy, receivers as aforesaid,

twenty-five thousand and eighty-two dollars, the value of five hundred bales of cotton shipped to the Hill Manufacturing Company and covered under two bills of lading of the C., V. & C. line, issued to Ellerton L. Don & Co., dated respectively October 21st and October 28th, 1887, and that it recover of them the farther sums of six hundred and forty-four dollars and thirty-seven cents and six hundred and forty-six dollars and sixty cents, the freight prepaid on the two lots of cotton, with interest thereon of sixty-eight hundred
1171 and fifty-six dollars and ninety-seven cents, making the aggregate sum of thirty-three thousand two hundred and twenty-nine dollars and ninety-four cents.

VI.

That the Phenix Insurance Company have and recover of Anthony J. Thomas and Charles E. Tracy, receivers, forty-nine hundred and ninety-seven dollars and sixty-nine cents, the value of one hundred bales of cotton covered under bill of lading of the C., V. & C. line, dated November 12th, 1887, No. 115, and the sum of eleven hundred and ninety-eight dollars and thirty-nine cents interest thereon, making the aggregate sum of sixty-one hundred and ninety-six dollars and eight cents.

VII.

1172 That the Phenix Insurance Company have and recover of Anthony J. Thomas and Charles E. Tracy, receivers, fifty-four hundred and sixteen dollars and eighteen cents, the value of one hundred bales of cotton of the Tetocket mills, with fourteen hundred and eight dollars and twenty cents interest upon said sum, making in the aggregate the sum of sixty-eight hundred and twenty-four dollars and thirty-eight cents.

VIII.

That the Phenix Insurance Company have and recover of Anthony J. Thomas and Charles E. Tracy, receivers, the sum of fifty-seven hundred and ninety-one dollars and eighty-eight cents, with interest thereon from the 17th day of November, 1887, which is the further sum of fifteen hundred and five dollars and eighty-
1173 eight cents, making in the aggregate the sum of seventy-two hundred and ninety-seven dollars and seventy-six cents, which is the value, with interest, of one hundred and five bales of cotton, marked BRIX, covered under bill of lading No. 95 of the C., V. & C. line and known as the King Phillip mills cotton.

IX.

That the China Mutual Insurance Company have and recover of Anthony J. Thomas and Charles E. Tracy, receivers, twenty-four hundred dollars, the value of fifty bales of cotton marked ESTA, and interest thereon of six hundred and twenty-four dollars, making the aggregate sum of three thousand and twenty-four dollars.

X.

That the British and Foreign Insurance Company have
1174 and recover of Anthony J. Thomas and Charles E. Tracy, receivers, the sum of fourteen hundred and six dollars and twenty cents, the value of twenty-three bales of cotton marked VESX, consigned to order, notify E. R. Robertson and Co., with interest thereon of three hundred and sixty-five dollars and sixty-one cents, making the aggregate sum of seventeen hundred and seventy-one dollars and eighty-one cents.

XI.

That the Marine Insurance Company, Limited, of London have and recover of Anthony J. Thomas and Chas. E. Tracy, receivers—

(1.) Fifty-three hundred and seven dollars and forty-eight cents, the value of one hundred bales of cotton shipped to order, Attleborough, Mass., and thirteen hundred and seventy-nine dol-
1175 lars and ninety-four cents, being the interest thereon, making in the aggregate *in* the sum of sixty-six hundred and eighty-seven dollars and forty-two cents.

(2.) That it also have and recover of Anthony J. Thomas and Charles E. Tracy, receivers, twenty-one thousand and ten dollars and eighty-one cents, the value of four hundred and five bales of cotton covered under sundry bills of lading of the C., V. & C. line, destroyed in the aforesaid fire, and shipped from Memphis, Tennessee, to Warren, R. I., to order, notify the Warren Manufacturing Company, with interest thereon of fifty-four hundred and sixty-two dollars and eighty-one cents, making in the aggregate the sum of twenty-six thousand four hundred and seventy-three dollars and sixty-two cents.

1176 XII.

The court is of opinion that the lots of cotton mentioned and described in the pleadings and particularly enumerated therein and also enumerated in Exhibits 4 and 5 to the first deposition of L. L. Fellows were not delivered for immediate transportation by the agent of the C., V. & C. line to the agent of the N. N. & M. V. Co. and the C., O. & S. W. R'y Co., and doth accordingly adjudge that the carrier liability of the N. N. & M. V. Co. and the C., O. & S. W. R'y Co. did not attach, and that they are neither of them liable for the destruction of any of the said lots of cotton, and doth accordingly adjudge and decree that in so far as the recovery is sought against them the amended bill of the Insurance Company of
1177 North America and the petition and cross-bill of the Phenix Insurance Company be, and the same are hereby, dismissed.

XIII.

The court is of opinion and doth accordingly adjudge and decree that the plaintiffs and the above-named marine insurers in whose favor judgments are awarded against Anthony J. Thomas and

Charles E. Tracy, receivers aforesaid, did by the filing of the bill herein and the subsequent proceedings thereunder acquire liens upon the fund, credits, and property, real and personal, provided for the indemnity of Anthony J. Thomas and Charles E. Tracy, as receivers, against loss or liability for the destruction of the aforesaid lots of cotton, and did by the said proceedings bring into concourse all the creditors of the said Thomas and Tracy so as to entitle
1178 the creditors to a ratable share of the fund in the possession of the Merchants' Cotton Press and Storage Co. and the fund due from the Merchants' Cotton Press and Storage Co. on account of its breach of contract in failing to effect full insurance in good and solvent companies (the court finding that the insurance effected by the Merchants' Cotton Press and Storage Co. was only 85.55 per cent. and the deficit was 14.45 per cent.) and for its breach of duty as trustee in failing to collect by proper proceedings seventy-six thousand seven hundred and fifty dollars of insurance effected by it, and also to collect the balance due from the defendant fire insurance companies, who have been served with process and gar-
1179 nished to answer what, if anything, they owe applicable to the liability of the said Thomas and Tracy, and ratably apportion the proceeds *inter sese*, and also to subject to sale the Senatobia-street property and to apply the proceeds thereof ratably in exoneration of the judgments herein awarded against the said Thomas and Tracy.

And the court doth further order, adjudge, and decree that in the application and distribution of the funds derived from the collections hereinafter awarded and the sale of the Senatobia-street property the Delaware Insurance Company receive its ratable proportion, the court being of opinion that the Delaware Insurance Company did, by the assignment of the receivers dated the 22nd day of June, 1891, acquire all the rights, titles, claims, de-
1180 mands, and interests in or under or accruing by means of the written contract of the 24th of May, 1887, to the extent and value of five hundred bales of cotton marked D O N G and in the insurance fund in the possession of the Merchants' Cotton Press and Storage Company and the other assets hereinbefore decreed to be subject to the payment of the creditors mentioned.

XIV.

And the court doth further find that shortly after the fire of Nov. 17th, 1887, viz., on the 22nd of January, 1888, certain insurance companies, and among them the fire insurance companies now before the court, entered into an agreement with the Merchants' Cotton Press and Storage Company to abide by the result of the litigation waged against the Merchants' Cotton Press and
1181 Storage Company and jointly employed counsel to conduct that defense. The court is of opinion that Anthony J. Thomas and Charles E. Tracy, receivers, are now entitled to have and recover as indemnity against their aggregate liability the balance due on each of the policies of insurance granted to the Merchants' Cotton Press and Storage Company by the defendant fire insurance

companies served with process herein, namely, the Continental Insurance — of New York, the Liverpool, London & Globe Insurance Co. of England, the Fire Association of New York, the Mutual Fire Insurance Company of New York, the National Fire Insurance Co. of Connecticut, the Phenix Insurance Company of New York, and the Royal Insurance Company of England.

1182 Wherefore the court is pleased to order, adjudge, and decree that Anthony J. Thomas and Charles E. Tracy, receivers, have and recover of the Continental Insurance Company of New York ten thousand two hundred and nine dollars and twenty-five cents and twenty-six hundred and fifty-four dollars and thirty-four cents, interest from the 17th of February, 1888, making twelve thousand eight hundred and sixty-three dollars and fifty-nine cents; and of the Liverpool, London and Globe Insurance Co. of England twenty-three thousand eight hundred and twenty-one dollars and fifty-nine cents and fifty-seven hundred and seventeen dollars and four cents, interest from the 17th of February, 1884, making twenty-nine thousand five hundred and thirty-eight dollars and sixty-three cents, and of the Fire Association of New York sixty-eight hun-

1183 dred and six dollars and seventeen cents and seventeen hundred and sixty-nine dollars and fifty-four cents, interest from the 17th day of February, 1888, making seventy-five hundred and seventy-five dollars and seventeen cents; and of the Mutual Fire Insurance Company of New York thirty-four thousand and thirty dollars and eighty-four cents and eighty-eight hundred and forty-seven dollars and eighty cents, interest from the 17th of February, 1888, making an aggregate of forty-two thousand eight hundred and seventy-eight dollars and sixty-four cents; the National Fire Insurance Company of Connecticut thirty-four hundred and three dollars and eight cents and eight hundred and eighty-four dollars and seventy-eight cents, interest from the 17th of February, 1888, making the

1184 sum of forty-two hundred and eighty-seven dollars and eighty-six cents; the Phenix Insurance Company of New York twenty-three thousand eight hundred and twenty-one dollars and fifty-nine cents and fifty-seven hundred and seventeen dollars and four cents, interest from the 17th of February, 1888, making twenty-nine thousand five hundred and thirty-eight dollars and sixty-three cents, and of the Royal Insurance Company of England twenty-three thousand eight hundred and twenty-one dollars and fifty-nine cents and fifty-seven hundred and seventeen dollars and four cents, interest from the 17th of February, 1888, making twenty-nine thousand five hundred and thirty-eight dollars and sixty-three cents.

1185 And the court is *farther* pleased to order, adjudge, and decree that upon the recoveries last above awarded the plaintiffs have fixed a lien by garnishing the defendant insurance companies, so as to entitle them to a ratable apportionment of the proceeds of the recoveries awarded among the holders of the C., V. & C. Line bills of lading hereinbefore set forth, and so the court is pleased to order, adjudge, and decree.

XV.

And the court doth farther find that the Merchants' Cotton Press and Storage Co. was adjudged by the supreme court of Tennessee to be liable for the difference between the sum of fifty-two thousand four hundred and seventy-two dollars and twenty-six cents, the aggregate value of the cotton not covered by insurance other
1186 then the fire insurance held by the said compress company, and forty-four thousand seven hundred and twenty-nine dollars and eighty-six cents, the aggregate amount to which the owners of the said cotton were entitled under the principles of the decree entered in the said suit, and that of this difference the sum of forty-three hundred and ninety-four dollars and twelve cents, with interest from the 17th day of February, 1888, which is the sum of eleven hundred and sixteen dollars and forty-seven cents, making in the aggregate the sum of fifty-four hundred and ten dollars and fifty-nine cents, was adjudged to be the amount applicable to the liability of the *of the* C., V. & C. line. The court is pleased to order, adjudge, and decree that Anthony J. Thomas and Charles E. Tracy, receivers, have
1187 and recover, to be applied to the decrees rendered against them hereinbefore and to the Delaware Insurance Company ratably upon the value of the several lots of cotton, the aforesaid forty-three hundred and ninety-four dollars and twelve cents, with interest from the 17th day of February, 1888, which is the farther sum of eleven hundred and sixteen dollars and forty-seven cents, making in the aggregate the sum of fifty-four hundred and ten dollars and fifty-nine cents.

The court doth farther find that this court by its decree in the Deming case ascertained and adjudged that the aggregate value of the cotton covered under the bills of the C., V. & C. line was two hundred and forty-five thousand seven hundred and
1188 thirty-three dollars and forty-six cents and the amount of fire insurance ordered to be collected and held in reserve to await the determination of the liability of the C., V. & C. line to be two hundred and ten thousand two hundred and twenty-four dollars and thirty-seven cents, leaving a deficit of insurance of thirty-five thousand five hundred and nine dollars and none cents. The court is pleased to order, adjudge, and decree that, for the use and to be applied to the recoveries awarded against them and to the ratable share of the Delaware Insurance Company therein, Anthony J. Thomas and Charles E. Tracy, receivers, have and recover the farther sum of thirty-five thousand five hundred and nine dol-
1189 lars and nine cents from the Merchants' Cotton Press and Storage Co., with interest thereon from the 17th of February, 1888, which is by simple calculation the sum of eighty-eight hundred and seventy-seven dollars and twenty-seven cents, making in the aggregate the sum of forty-four thousand three hundred and eighty-six dollars and thirty-six cents.

XVI.

And the court doth farther find that on the 18th day of August, 1891, the solicitors for the fire insurance companies and the Merchants' Cotton Press & Storage Company addressed a communication to Messrs. Taylor and Carroll, the solicitors for the plaintiffs, in which, among other things, it was stated, "As the attorneys for the compress company and the other fire insurance compa-
1190 nies involved in the loss of cotton by the fire of the 17th of November, 1887, in the Navy Yard compress, we think that the proposition made by the German Fire Insurance Company should be accepted, and that a like settlement should be made, if practicable, with any other fire company standing in the same situation with the German."

The chief question to be stated to you as material to the determination of the question submitted is that shortly after the fire about two hundred and twenty-five thousand dollars in value of the fire insurance companies entered into an arrangement by which they are in effect bound by the results of the litigation against the compress company. The remaining fire compa-
1191 nies, *amounting to* about seventy-six thousand seven hundred and fifty dollars, declined to enter into this arrangement, but paid the *pro rata* then immediately demanded of them, saying, however, that they did not admit the sufficience-es of the preliminary proofs submitted and waived no rights of defense by so doing, from which it appears, as well as from the testimony about S. R. Montgomery, that insurance companies representing about seventy-six thousand seven hundred and fifty dollars of the aggregate amount of insurance held by the Merchants' Cotton Press and Storage Company declined to enter into a stipulation to be bound by the result of the litigation waged against the said company, but, on the contrary, expressly waived no rights under their poli-
1192 cies; and it appearing further to the court that no proceedings have been taken to collect the said policies, and that they all contained a contract bar of limitation of one year, the court is of opinion that the Merchants' Cotton Press and Storage Company is and was an express trustee of an express trust, and as such was under the duty and obligation to collect the said insurance by suit, if necessary, and to keep alive the said policies, and, having failed to do so, is liable to the extent of the damage suffered by its *cestuis que trust*., one of which the court finds to be the C., V. & C. line, represented by Anthony J. Thomas and Charles E. Tracy.

The court is therefore pleased to order, adjudge, and decree that Anthony J. Thomas and Charles E. Tracy,
1193 receivers, have and recover of the Merchants' Cotton Press and Storage Company for breach of its duty in this behalf the sum of fifty-two thousand three hundred and fifteen dollars and ten cents, the *pro rata* interest of the said receivers in the said sum of seventy-six thousand seven hundred and fifty dollars of fire insurance, and the sum of thirteen thousand and seventy-eight — and

seventy-five cents, being interest from the said 17th day of February, 1888, making the aggregate sum of sixty-five thousand and three hundred and ninety-three dollars and eighty-five cents, and that the said amount be ratably apportioned among the plaintiffs and cross-plaintiffs, in whose favor decrees are rendered against the receivers aforesaid.

1194 And the court is pleased to order, adjudge, and decree that unless the sums due by the Merchants' Cotton Press and Storage Company shall be paid within sixty days the lot or parcel of land particularly described in Exhibit No. 48 be sold and the proceed- applied to the payments of the recoveries against the Merchants' Cotton Press and Storage Company, and that the other creditors of the said Merchants' Cotton Press and Storage Company be required, before participating in the distribution of the proceeds, to exhaust the one hundred and twenty-six thousand dollars of stock set apart to pay the outstanding indebtedness of the Merchants' Cotton Press and Storage Company existing prior to its consolidation with the Buyers' and Factors' Press, and that the bal-

1195 ance be ratably apportioned among the certificate-holders mentioned and described in Exhibit No. 48, and who are averred to be — numerous class, whose names are unknown to the plaintiffs.

XVII.

It is farther ordered, adjudged, and decreed that the Merchants' Cotton Press and Storage Company, as trustees of the fire policies, do proceed to collect of the fire insurance companies not now before the court and who have entered into agreement with the said compress company to abide by the results of litigation waged against it, the balance due on the several policies, with interest thereon from the 17th day of February, 1888, and pay over the same to Anthony J. Thomas and Charles E. Tracy, receivers, to the extent of

1196 the amount of each balance applicable to the liability of the C. V. & C. line, to be by them ratably applied to the decrees herein and the Deleware Insurance Company.

XVIII.

The cross-bills of the marine insurance companies not holding the bills of lading of the C., V. & C. line are dismissed. The cost herein will be paid by the receivers, the Merchants' Cotton Press and Storage Company, and the fire insurance companies defendant and the marine insurance companies whose cross-bills are dismissed, except the cost incidental to making the C., O. & S. W. Railway Company and the N. N. & M. V. Company defendants and they will be divided between the Insurance Company of North

1197 America and the Phenix Insurance Company.

The court doth farther adjudge and decree that upon the recoveries herein awarded and the costs adjudged in this cause executions may issue as at law.

It is further ordered that the *pro confesso* heretofore entered against the defendant The Mutual Fire Insurance Company of

New York be, and the same is now, set aside, and said company is allowed now to adopt the answer filed herein by the Continental Insurance Company of New York and the other fire insurance companies who have answered and to have the benefit of all the proof introduced in the cause. The name of said Mutual Fire Insurance Company may be inserted in the answer of the other fire insurance companies. From all the foregoing decree that
1198 adjudges the N. N. & M. V. Co. and C., O. & S. W. R. R. Co. not to be liable for the value of one hundred and fifty bales of cotton to the Insurance Company of North America, nor for the value of seven hundred and ninety-eight bales of cotton to the Phenix Insurance Co., they respectively pray appeals to the next term of the Supreme Court, to be held at Jackson for the western division of Tennessee, which are granted upon their giving bond conditioned according to law.

The defendant The M. C. P. & S. Co. prays an appeal from the above decree to be heard at the next term of the supreme court at Tennessee for the western division of Tennessee, to be held at Jackson, Tennessee, which appeal is granted upon its giving an appeal bond in the penalty of $5,000.00, conditioned to pay
1199 all the costs and damages incurred by said appeal.

And the defendant- The Continental Insurance Company of New York, and the The Liverpool, London and Globe Insurance Company of England, and The Mutual Fire Insurance Company of New York, and The Fire Association of New York, and The National Fire Insurance Company of Conn., and The Royal Insurance Company of England severally pray an appeal from the above decree to the next term of the supreme court for the western division of Tennessee, to be held at Jackson, Tenn., which appeal is severally granted to each of said defendants upon their executing an appeal bond as required by law, and from so much and such parts of the foregoing decree as dismisses their cross-bills and fails to render in their favor respectively for the values of the several lots of
1200 cotton set forth in their several cross-bills against the def'ts therein, the comp'ts in said cross-bills, to wit, The Union Marine Insurance Company, Limited, of Liverpool (or London, England), Maratime Insurance Co., Union Fire and Marine Insurance Co., Ulster Marine Insurance Co., Rhenish Westphalian Insurance Co., Lloyds, and Underwriters at Lloyds', severally pray an appeal to its next term of the supreme court of Tennessee, to be held at Jackson, Tenn., for the western division thereof, on the 1st Monday in April, 1892, which appeal is now granted upon said cross-complainants severally entering into appeal bonds for $250.00 each in the form required by law and with proper security, to be approved by the clerk and master, which is now accordingly done; and thereupon the parties hereto present their bill of
1201–2145 exceptions, which, having been examined by the court and found correct, is now signed and sealed and made a part of the record.

Before the hearing of the case was begun the defendants objected to the case being taken up and heard in this court upon the ground

that upon the petition of certain of defendants the cause had been removed to the U. S. circuit court for the western district of Tennessee, at Memphis, which objection was overruled and exception taken by defendants.

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2146 *Supreme Court Opinion.*

INSURANCE CO. OF NORTH AMERICA *et al.* *vs.* DELAWARE MUTUAL SAFETY INS. CO. *et al.* } Opinion.

This suit results from a declaration of a liability (not adjudged because the carrier was not before the court) against the Cairo, Vincennes & Chicago line in the consolidated causes of Deming *v.* Storage Co., reported in 90 Tenn., 311; 17 S. W. Rep., 89. The opinion in these causes and those to which it refers give in full the history of facts out of which the present litigation grows, and some of these facts need not be repeated here. It is sufficient to say the court then thought and, on principles there settled, declared, as it now adjudges, that such line was and is liable. Nothing in
2147 this record or in the argument upon it affects the view then taken. It also then adjudged and now repeats that the C., V. & C. line was a necessary party to relief sought incidentally and secondarily against other defendants then before the court and now before it. This bill was filed on the 7th of Aug., 1891, by marine insurers against proper representatives of that line, who entered appearance to litigate the merits of the unadjudged liability. The other defendants are The Merchants' Cotton Press & Storage Company and various fire and marine insurance companies.

On the merits of the controversy the special chancellor, Lehman, reached a conclusion as to the liability of the C., V. & C. line and on other questions in which we concur, including that of the real liability of the Newport News and Mississippi Valley Com-
2148 pany as to 948 bales of cotton; and the only question about which we have had any serious difficulty (in view of principles heretofore settled on other points) is that of jurisdiction, determined by the chancellor before the hearing of the merits, and arises upon his refusal to permit the removal of the cause to the Federal court upon the petition and bond of certain fire insurance companies, presented to the court the 5th of Oct., 1891, and amended November 21–23, 1891.

We hold that the real controversy in the case is between the marine insurers complaining and those for whom they sue and the receivers of the C., V. & C. line, defendants. The object of the controversy was to charge that line with loss sustained by shippers and paid by these complaining companies, and incidentally to collect of other defendants (the fire companies) whatever decree
2149 might be obtained. These defendants, though made such to the bill as formal parties, occupied substantially the positions of garnishees and were made defendants only that their indebtedness on account of insurance obligations might be reached and

held subject to such final decree as complainants might obtain against the C., V. & C. line, and no separable controversy, in the sense of the statute, is thus presented or otherwise arises as to them on any proper rearrangement of parties. Bacon *v.* Rives, 106 U. S., 99–108; 1 Sup. C't Rep., 3. The position that there is in fact a suit between the Merchants' Cotton Press & Storage Company and the fire companies, being "virtually a suit by the former against the latter," is not maintainable, nor that the decree must of necessity be in its name against such companies, for, though the decree might take that form, it is not essential that it should do
2150 so, as it may properly recite facts of failure and refusal of that company (the nominal assured) to sue and adjudge liability directly in favor of complainants after proper account stated, all parties being before the court, The Merchants' Cotton Press & Storage Company as defendants. The Merchants' Cotton Press & Storage Company, whose duty it was as trustee to sue for and collect and appropriate to proper parties the insurance effected by it for them, having negligently refused to do so, the marine insurers had, therefore, the right to join it as defendants and make all the fire insurance companies defendants and have exact liability of each fixed and adjudged in complainants' favor. It may — true that complainants, obtaining decree against the C., V. & C. line, might have sued each fire insurance company separately for
2151 its proportion of the insurance to which by virtue of such recovery complainants might have been authorized to subject it; but the same is true in respect to appropriation of indebtedness of garnishees, and yet it does not follow that for such reason such debtors may not all be proceeded against at the same time and with a view to hold such indebtedness to satisfy a prospective recovery under the general privileges of equity and under our statute (Code, § 4200), nor change the fact that the litigation with them is but incidental to the main controversy. If complainants fail in that, no controversy remains, and question for settlement between any parties to the suit. The marine insurers had no right of action against any of these fire companies except as incidental to their litigation with this carrier. These fire companies, in the language of Railroad Co. *v.*
2152 Wilson, 114 U. S., 60–62; 5 Sup. C't Rep., 738, "are made parties only in aid of the princip*le* relief which is asked," and "no relief whatever can be granted" unless a judgment is obtained against the carrier, and "as to that controversy the carrier is an indispensable party." "The sole purpose of the suit" is to obtain the judgment and secure its collection. "The suit is, therefore, against both on a single cause of action." The quotations which we have made from the Wilson case are not, it is true, of a controversy exactly the same in fact, but we think the same in principle, as are also those of Crump *v.* Thurber, 115 U. S., 56–61; 5 Sup. C't Rep., 1154, and Safe Deposit Co. *v.* Huntingdon, 117 U. S., 280–282; 6 Sup. C't Rep., 733. This case, too, like the last one cited, is peculiarly one in which all the fire com-
2153 panies, with the defaulting trustee, the Merchants' Cotton

Press & Storage Company, should have been joined. There was no separate insurance on particular cotton or in favor of a particular owner or carrier. The liability of each defendant is the object of an equitable account, and the recovery of each complainant depends upon it. Each insurer is in equity indebted to each carrier in some amount, and the Merchants' Cotton Press & Storage Company for the remainder as delivered by the chancellor. Taking this view of the question, we have not deemed it essential to go into a discussion of other reasons assigned for the non-removability of this cause. Presenting, as it does, a Federal question, which gives to the Supreme Court a revising jurisdiction on this point, where our action rather than our opinion will come in view, we are content merely to state our conclusion upon the
2154 ground indicated and our concurrence in decree refusing removal on that ground, because all advanced by us or not advanced will be gone over again if carried there and the question determined without reference to that upon which our decision is placed, and we do not deem it necessary to extend this opinion if no appeal is taken. One other point on a question of Federal law is made which it is proper to definitely state and decide. It is argued that the shipper and the carrier were, through their representatives, engaged in an unlawful violation of the interstate commerce law *law*, which forbids and declares unlawful all special rates, rebates or drawbacks, and preferences (sections 2, 3, p. 529, Supp. to Rev. St. U. S.; section 6 as amended by act March 2, 1889, pp. 684, 685), and an assignment of error is predicated upon this fact to relief decreed the in-
2155 surer. This fact of special rate and rebate is denied, and it is a matter of controversy and conflict of evidence, and it is also insisted in answer to this by plaintiffs that the interstate commerce law does not apply for the reason that the evidence disproves any "common contract" over the river and rail rate. We are of opinion, however, and rest our decision upon the ground that if it were assumed that the law was applicable and the fact of agreement for rebate and special rate proven it would not prevent liability on the part of the carrier for the freight received and covered by insurance in the hands of the carrier's agent. The law makes such agreements as to rebate, etc., void, but does not make the contract of affreightment otherwise
2156 void, and we think there is nothing in the law or the policy of it which requires a construction that would excuse a carrier from all liability when it made such a contract in connection with that for receipt and transportation of freight. Such a construction would encourage rather than discourage such unlawful agreements for rebates. The carrier might prefer them to liability for the freight. Such a contract for rebate would be void, and of course agreed freights in violation of law could not be enforced; but we think the shipper could nevertheless recover for loss of his freight through the carrier's and insurer's negligence. No different construction has yet been put upon the interstate commerce law so far as we are advised, and we decline to give it any

other. Other questions made by counsel have all been considered.

We think there was no objection to the arrangement
2157–2159 by which the receivers entered their appearance or to their contract for carriage or for insurance or of reinsurance available to defendants. Assignments of error not specifically mentioned are overruled after full consultation. We are of opinion there is nothing in any of them to prevent complainants recovering or change the decree of the chancellor, and it is affirmed. Both parties having appealed are taxed equally with costs of this court.

SNODGRASS, *J.*

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2160 *Decree Supreme Court.*

Entered June 8th, 1892.

INS. CO. OF N. A. OF PA. *vs.* D. M. S. INS. CO. *et al.* } ≠ 47, Shelby C. D.

This cause was heard upon the transcript of the record from the chancery court of Shelby county, and, it appearing to the court that in the decree of the court below there is no error, it is therefore ordered, adjudged, and decreed that said decree be affirmed.

2161 And the court being of opinion that the plaintiffs and the cross-plaintiffs, the marine ins. Co's whose policies covered cotton under the bills of lading of the C., V. & C. line, are severally entitled to judgments against Anthony J. Thomas and Chas. E. Tracy, receivers, except the Delaware Insurance Company, and that is entitled to a ratable proportion of the fund, credits, and property provided for the indemnity of the carrier—

Wherefore the court orders, adjudges, and decrees:

First.

That the Insurance Company of North America of Philadelphia have and recover of Anthony J. Thomas and Chas. E. Tracy, receivers, the sum of eight thousand six hundred and fifty-nine and $\frac{77}{100}$ dollars ($8,659.77), being the amount of the de-
2162 cree below, with interest to this date.

Second.

That the Atlantic Mutual Ins. Company of New York have and recover of Anthony J. Thomas and Chas. E. Tracy, receivers, the sum of three thousand one hundred and thirty-eight and $\frac{99}{100}$ dollars ($3,138.99), amount of decree below, with interest to this date.

Third.

That the Providence Washington Insurance Company have and recover of Anthony J. Thomas and Chas. E. Tracy, receivers, the sum of six thousand three hundred and ninety and $\frac{28}{100}$ dollars ($6,390.28), amount of judgment below, with interest to this date.

Fourth.

That the Phenix Insurance Company have and recover of
2163 Anthony J. Thomas and Chas. E. Tracy, receivers, the sum of one hundred and seventy-five thousand seven hundred and nine & $\frac{3}{100}$ dollars ($175,709.03), amount of decree below, with interest from this date.

Fifth.

That the Phenix Insurance Company have and recover of Anthony J. Thomas and Chas. E. Tracy, receivers, the sum of thirty-three thousand six hundred and twenty-three and $\frac{16}{100}$ dollars ($33,623.16), amount of decree below, with interest to this date.

Sixth.

That the Phenix Insurance Company have and recover of Anthony J. Thomas and Chas. E. Tracy, receivers, the sum of six thousand two hundred and sixty-eight & $\frac{31}{100}$ dollars ($6,268.31), amount of the decree below, — to this date.

2164 Seventh.

That the Phenix Insurance Company have and recover of Anthony J. Thomas and Chas. E. Tracy, receivers, the sum of six thousand nine hundred and five and $\frac{76}{100}$ dollars ($6,905.76), amount of the decree below, with interest to this date.

Eighth.

That the Phenix Insurance Company have — recover of Anthony J. Thomas and Chas. E. Tracy, receivers, the sum of seven thousand three hundred and eighty-four and $\frac{12}{100}$ dollars (7,384.12), amount of decree below, with interest to this date.

Ninth.

That the China Mutual Insurance Company have and recover of Anthony J. Thomas and Chas. E. Tracy, receivers, the sum
2165 of three thousand and sixty & $\frac{78}{100}$ dollars (3,060.78), amount of decree below, with interest to this date.

Tenth.

That the British and Foreign Insurance Company have and recover of Anthony J. Thomas and Chas. E. Tracy, receivers, the sum of seventeen hundred and ninety-two and $\frac{78}{100}$ dollars (3,060.78), amount of decree below, with interest to this date.

Eleventh.

That the Marine Insurance Company, Limited, of London, have and recover of Anthony J. Thomas and Chas. E. Tracy, receivers, the sum of thirty-three thousand five hundred and fifty-three and $\frac{44}{100}$ dollars (33,553.44), amount of decree below, with interest to this date.

Twelfth.

2166 The court is of opinion that the lots of cotton mentioned and described in the pleadings and particularly enumerated therein and also enumerated in Exhibits 4 and 5 to the first deposition of L. L. Fellows were not delivered for immediate transportation by the agent of the C., V. & C. line to the agent of the N. N. & M. V. Co. and the C., O. & S. W. Company, and doth accordingly adjudge that the carrier liability of the N. N. & M. V. Co. and the C., O. & S. W. R'y Co. did not attach, and that they are neither of them liable for the destruction of any of the said lots of cotton, and doth accordingly adjudge and decree that, in so far as the recovery is sought against them, the amended bill of the Insurance
2167 Company of North America and the petition and cross-bill of the Phenix Insurance Company be, and the same are hereby, dismissed.

Thirteenth.

The court is of opinion and doth accordingly adjudge and decree that the plaintiffs and the above-named marine insurers, in whose favor judgments are awarded against Anthony J. Thomas and Chas. E. Tracy, receivers aforesaid, did by the filing of the bill herein and the subsequent proceedings thereunder acquire lien upon the fund, credit, and property, real and personal, provided for the indemnity of Anthony J. Thomas and Chas. E. Tracy, as receivers, against loss or liability for the destruction of the aforesaid lots of cotton, and did by the said proceedings bring into
2168 concourse all the creditors of the said Thomas and Tracy so as to entitle the creditors to a ratable share of the fund in the possession of the Merchants' Cotton Press and Storage Company and the fund due from the Merchants' Cotton Press and Storage Company on account of its breach of contract in failing to effect full insurance in good and solvent companies (the court finding that the insurance effected by the Merchants' Cotton Press and Storage Company was only eighty-five and $\frac{55}{100}$ per cent. and the deficit was fourteen & $\frac{45}{100}$ per cent.) and for its breach of duty as trustee in failing to collect by proper proceedings seventy-six thousand seven hundred and fifty dollars of insurance effected by it, and also to collect the balance due from the
2169 defendant fire insurance companies who have been served with process and garnished to answer what, if anything, they owe applicable to the liability of the said Thomas and Tracy and ratably apportion the proceeds *inter sese*, and also to subject to sale the Senatobia-street property and to apply the proceeds thereof ratably in exoneration of the judgments herein awarded against the said Thomas and Tracy.

And the court doth further order, adjudge, and decree that in the application and distribution of the funds derived from the collections hereinafter awarded and the sale of the Senatobia-street property the Delaware Insurance Co. receive its ratable proportion, the court being of opinion that the Delaware Insurance Co. did by the
2170 assignment of the receivers dated the 22nd June, 1891, ac-

quire all the rights, titles, claims, demands, and interests in or under or accruing by means of the written contract of the 24th of May, 1887, to the extent and value of five hundred bales of cotton marked DONG and in the insurance fund in the possession of the Merchants' Cotton Press and Storage Company and the other assets hereinbefore decreed to be subject to the payment of the creditors mentioned.

Fourteenth.

And the court doth further find that shortly after the fire of Nov. 17, 1887, viz., on 22nd of Jan'y, 1888, certain insurance companies, and among them the fire insurance companies now
2171 before the court, entered into an agreement with the Merchants' Cotton Press and Storage Company to abide by the result of the litigation waged against the Merchants' Cotton Press and Storage Company and jointly employed counsel to conduct that defense. The court is of opinion that Anthony J. Thomas and Chas. E. Tray, receivers, are entitled to have and recover as indemnity against their aggregate liability the balance due on each of the policies of insurance granted to the Merchants' Cotton Press and Storage Company by the defendant fire insurance companies served with process herein, namely, the Continental Insurance — of New York, the Liverpool, London and Globe Insurance Co. of England, the Fire Association of New York, the Mutual Fire Insur-
2172 ance Company of New York, the National Fire Insurance Co. of Connecticut, the Phenix Insurance Co. of New York, and the Royal Insurance Co. of England.

Wherefore the court orders, adjudges, and decrees that Anthony J. Thomas and Chas. E. Tracy, receivers, recover of the Continental Insurance Co. of New York $13,015.80, amount of the decree below, with interest to this date, and of the Liverpool, London and Globe Insurance Co. of England the sum of $29,886.30, amount of judgment and interest of the court below, and of the Fire Association of New York $7,664.81, amount of judgment and interest below, and of the Mutual Fire Insurance Co. of New York the sum of
2173 $43,386.00, amount of judgment and interest below, and of the National Fire Insurance Co. of Connecticut the sum of $4,337.60, amount of judgment below and interest below to date, and of the Phenix Insurance Co. — New York the sum of $29,886.30, amount of decree below and interest to this date, and of the Royal Insurance Co. of England the sum of $29,886.30, amount of decree and interest to this date.

The court further orders, adjudges, and decrees that upon the recoveries last above awarded the plaintiffs have fixed a lien by garnishing the defendant insurance Co.'s so as to entitle them to a ratable apportionmentof the proceeds of the recoveries awarded among the holders of the C., V. & C. Line bills of lading herein before set forth.

2174 Fifteenth.

And the court doth further find that the Merchants' Cotton Press and Storage Company was adjudged by this court to be liable for the difference between the sum of $52,472.26, the aggregate value of the cotton not covered by insurance other than the fire insurance held by the said compress Co., and $44,729.86, the aggregate amount to which the owners of the said cotton were entitled under the principles of the decree entered in the said suit, and that of this difference the sum of $4,394.12, with interest from the 17th of Feb., 1888, which is the sum of $1,116.47, making in the aggregate the sum of $5,410.59, was adjudged to be the amount applicable to the
2175 liability of the C., V. & C. line. The court is pleased to order and decree that Anthony J. Thomas and Chas. E. Tracy, receivers, have and recover, to be applied to the decrees rendered against them hereinbefore, and to the Delaware Insurance Co. ratably upon the value of the several lots of cotton, the aforesaid forty-three hundred and ninety-four dollars and twelve cents, with interest from the 17th of February, 1888, which is the further sum of $1,116.47, making in the aggregate the sum of $5,410.59, which with interest from the date of the judgment to this date, amounts, to $5,474.44.

The court doth further find that this court by its decree in the Deming case ascertained and adjudged that the aggregate value
2176 of the cotton covered under the bills of the C., V. & C. line was $245,733.46 and the amount of fire insurance ordered to be collected and held in reserve to wait the determination of the liability of the C., V. & C. line to be $210,224.37, leaving a deficit of insurance of $35,509.09. The court is pleased to order and decree that for the use and to be applied to the recoveries awarded against them and to the ratable share of the Delaware Insurance Co. therein Anthony J. Thomas and Chas. E. Tracy, receivers, recover the further sum of $35,509.09 from the Merchants' Cotton Press and Storage Co., with interest thereon from the 17th of Feb., 1888, which is the sum of $8,877.27, aggregating $44,386.36; with interest from rendition of the judgment below makes the sum of
2177 $44,910.11.

Sixteenth.

And the court doth further find that on the 18th of August, 1891, the solicitors for the fire insurance companies and the Merchants' Cotton Press and Storage Company addressed a communication to Taylor & Carroll, solicitors for the plaintiff, in which, among other things, it was stated, "As the attorneys for the compress company and the other fire insurance companies involved in the loss of the cotton by the fire of the 17th Nov., 1887, in the 'Navy Yard' compress we think that the proposition made by the German Fire Insurance Co. should be accepted, and that a like settlement should be made, if practicable, with any other fire company standing in the
2178 same situation with the German."

The chief question to be stated to you as material to the determination of the question submitted is that shortly after the

fire about $225,000.00 in value of the fire insurance companies entered into an arrangement by which they are in effect bound by the results of the litigation against the compress company. The remaining fire companies, amounting to about $76,750.00, declined to enter into this arrangement, but paid the *pro rata* the- immediately demanded of them, saying, however, that they did not admit the sufficiencies of the preliminary proof submitted and waived no rights of defense by so doing, from which it appears, as well
2179 as from the testimony *about* S. R. Montgomery, that insurance companies representing about $76,750.00 of the aggregate amount of insurance held by the Merchants' Cotton Press and Storage Company declined to enter into a stipulation to be bound by the result of the litigation waged against the said company, but, on the contrary, expressly waived no rights under their policies; and it appearing to the court that no proceedings have been taken to collect the said policies and that they all contained a contract bar of limitation of one year, the court is of opinion that the Merchants' Cotton Press and Storage Company is and was express trustee, and as such was under the duty and obligation to collect the said insurance by suit, if necessary, and to keep alive
2180 the said policies, and, having failed to do so, is liable to the extent of the damage suffered by the *cestuis que trust.*, *of* which the court finds to be the C., V. & C. line, represented by Anthony J. Thomas and Chas. E. Tracy.

The court therefore orders, adjudges, and decrees that Anthony J. Thomas and Chas. E. Tracy, receivers, recover of the M. C. P. and S. Co. for breach of its duty in this behalf the sum of $66,167.60, amount of the decree below, with interest to date, and that the said amount be ratably apportioned among the plaintiff and cross-plaintiffs in whose favor decrees are rendered against the receivers aforesaid.

And the court orders and decrees that unless the sums due by the M. C. P. and S. Co. shall be paid within sixty days the
2181 lot or parcel of land particularly described in Exhibit No. 48 be sold upon the terms and conditions prescribed in Exhibit No. 48 by the clerk of this court and the proceeds applied to the payment of the recoveries against the M. C. P. & S. Co., and that the other creditors of the said M. C. P. & S. Co. be required before participating in the distribution of the proceeds to exhaust the $126,000.00 of stock set apart to pay the outstanding indebtedness of the M. C. P. & S. Co. existing prior to its consolidation with the Buyers and Factors' Press, and that the balance be ratably apportioned among the certificate-holders mentioned and described in said Exhibit No. 48 and who are averred to be — numerous
2182 class, whose names are unknown to the plaintiff.

Seventeenth.

It is further ordered and decreed that the Merchants' Cotton Press and Storage Company, as trustee of the fire policies, do proceed to collect of the fire insurance companies not now before the court, and who have entered into agreement with the said com-

press company to abide by the results of litigation waged against it, the balance due on the several policies, with interest thereon from the 17th day of Feb'y, 1888, and pay over the same to Anthony J. Thomas and Chas. E. Tracy, receivers, to the extent of the amount of each balance applicable to the liability of the C., V. & C. line, to be by them ratably applied to the decrees herein
2183 and the Delaware Insurance Company.

Eighteenth.

The cross-bills of the marine insurance companies not holding the bills of lading of the C., V. & C. line are dismissed. The costs herein will be paid by the receivers, the Merchants' Cotton Press and Storage Company, and the fire insurance companies defendants, except the costs incidental to making the Chesapeake and Ohio R. R. Company and the N. N. & M. V. Co. defendants, and they will be divided between the Insurance Company of North America and the Phenix Insurance Co.

The court doth further decree that upon the recoveries herein awarded and the costs adjudged in this case executions may issue.

Nineteenth.

2184 The costs of the court below, except hereinafter stated, will be paid as decreed by that court.

The costs of this cause, except as herein decreed, will be paid by the complainants and cross-complainants holding the bills of lading of the C., V. & C. line, by the Merchants' Cotton Press and Storage Company, by the defendants fire insurance companies, and by the receivers, Thomas and Tracy, in equal proportions. The costs incident- to the cross-bills of the cross-complainants not holding the bills of lading of the C., V. & C. line both in this court and the court below will be paid by said cross-complainants.

For all such costs execution may issue against the parties adjudged liable and against the sureties on their respective
2185 cost bonds, appeal bonds, and writ of error bonds.

Twentieth.

The court in affirming the decree of the court below denying the right of the petitioning defendants to remove the cause to the circuit court of the United States for the western district of Tennessee was of opinion as follows:

We hold that the real inconsistency in the case is between the Marine Insurance Company and those for whom they sue and the receivers of the C., V. & C. line, defendants.

The object of the controversy was to charge that line with loss sustained by shippers and paid by those companies and incidentally to collect of other defendants (the fire companies)
2186 whatever decree might be obtained.

The defendants, though made such to the bill as former parties, occupied substantially the position of garnishee and were made defendants only that their indebtedness on account of

insurance obligations might be reached and held subject to such final decree as complainants might obtain against the C., V. & C. line, and no separable controversy in the sense of the statute is thus presented or otherwise arises as to them on any proper rearrangement of parties. 106 U. S., 99–108, Bolen *vs.* Reics.

The position that this is in fact a suit between the Merchants' Cotton Press and Storage Co. and the fire companies, being "virtually a suit by the former against the latter," is not
2187 maintainable, nor that the decree must of necessity be in its name against such companies, for, though the decree might take that form, it is not essential that it should do so, as it may properly recite facts or failure and refusal *or that to* (the nominal assured) to sue and adjudge liability directly in favor of complainants after proper accounts stated, all parties being before the court, M. C. P. & S. Co. as defendant.

The Merchants' Cotton Press and Storage Co., whose duty it was as trustee to sue for and collect and appropriate to proper parties the insurance effected by it for them, having neglected and refused to do so, the marine insurers had therefore the right to join
2188 it as defendant and make all the fire insurance Co.s defendants and have exact liability of each fixed and adjudged in complainants' favor.

It may be *time* that complainant, after obtaining decree against the C., V. & C. line, might have sued each fire insurance Co. seperately for its proportion of the insurance which, by virtue of such recovery, complainants might have been authorized to subject it, but the same is true in respect to the appropriation of indebtedness of garnishees, and yet it does not follow that for such reasons such debtors may not all be proceeded against at the same time and with a view to hold such indebtedness to satisfy a prospective recovery under the general privileges of equity and under our statute
2189 (Code, § 4200), nor change the fact that the litigation with them is but incidental to the main controversy.

If the complainants fail in that no controversy remains and no question for settlement between any parties to the suit.

The marine insurers had no right of action against any except as incidental to its litigation with this carrier. These fire companies, in the language of R. Co. *vs.* Wilson (114 U. S., 60–62), "*and* made parties only in aid of the principal relief which is asked," and no relief whatever can be granted "unless a judgment is obtained against the carrier, and as to that controversy the carrier is an indispensable party." "The sole purpose of the suit is to obtain
2190 the judgment and secure its collection." "The suit is, therefore, against both on a single cause of action." The quotations which we have made from the Wilson case are not, it is true, of a controversy exactly the same in fact, but we think the same in principle, as are also those of Crumpe *vs.* Thurbar, 115 U. S., 56 & 61, and Fidelity Ins., Trust and Safe Deposit Co. *vs.* Huntingdon, 117 U. S., pages 280 & 2.

This case, too, like last one cited, is peculiarly one in which all the fire companies with the defaulting trustee, the M. C. P. & S. Co.,

would have been joined. There was no separate insurance on particular cotton or in favor of a particular owner or carrier. The liabilities of each defendant is the object of an equitable
2191 account, and the recovery of each complainant depends upon it. Each insurer is in equity indebted to each carrier in some amount and the M. C. P. & S. Co. for the remainder, as delivered by the chancellor. Taking this view of the question, we have not deemed it essential to go into a discussion of other reasons assigned for the non-removability of this cause. Presenting as it does a Federal question which gives to the Supreme Court a revisory jurisdiction on this point, where our action rather than opinion will come in review, we are content merely to state our conclusion upon the ground indicated and our concurrence in decree refusing removal on that ground because all advanced by us and not advanced by us will be gone over again if carried there, and the ques-
2192 tion determined without reference to that upon which our decision is placed, and we do not deem it necessary to extend this opinion if no appeal is taken.

And in the defense set up in the answer of the M. C. P. and S. Co. and the fire insurance Co., to the effect that the bill- of lading of the C., V. & C. line referred to in the record were issued under an agreement between the shippers and the agent of that line, made in violation of the act of Congress and the amendments thereto known as the interstate commerce law, the court was of opinion as follows, viz: One other point, however, on a question of Fed-
2193 eral law is made which it is proper to definitely state and decide. It is argued that the shipper and the carrier were through their representatives engaged in an unlawful violation of the interstate commerce law, which forbids and declares unlawful all special-rate rebates, drawbacks, and preferences." Sec. 2 & 3, page 529, Sup. Rev. St. U. S.; sec. 6, as amended by act of March 2nd, 1889, page- 684 and '5, and an assignment of errors is predicated upon this fact to relief decreed the insurer. This act of special rate and allowance of rebate is denied, and it is matter of controversy and conflict of evidence, and it is also insisted in answer to this by plaintiffs that the interstate commerce law does not apply, [illegible] the reason that the evidence disproves any "com-
2194 mon contract" over the — and rail routes. We are of opinion, however, and rest our decision upon the ground that if it were assumed that the law was applicable and the fact of agreement for rebate and special rate proven, it would not prove liability on the part of the carrier for the freight received and covered by insurance in the hands of the carrier's agent.

The law makes such agreements as to rebates, &c., void, but does not make the contract of affreightment otherwise void, and we think there is nothing in the law or the policy of it which requires the construction that would excuse a carrier from all liability when it made such a contract in connection with that for receipt and transportation of freight.

2195 Such a construction would encourage rather than discourage such unlawful operations for rebates.

The carrier might prefer them to liability for the freight. Such a contract as to rebate would be void, and of course agreed freight rate in violation of law could not be enforced, but we think the shipper could nevertheless recover for the loss of his freight through the carrier's negligence and incidentally of carrier's insurers. No different construction has yet been put upon the interstate commerce law, so far as we are advised, and we decline to give it any other.

The foregoing is embodied in this decree to evidence that the said questions were raised and disposed of as above shown.

2196 To the honorable Supreme Court of the United States:

Your petitioner, the Merchants' Cotton Press & Storage Company of Memphis, prays that a writ of error may issue to the honorable supreme court of Tennessee, at Jackson, directing said court to send to this court the record of the case of The Insurance Company of North America of Philadelphia *et al. vs.* The Delaware Mutual Safety Insurance Company *et al.*, to the end that the several and separate judgment rendered against your petitioner may be reviewed and reversed and such judgment ordered in respect to your petitioner in the case aforesaid as of right ought to be ordered.

Your petitioner tenders herewith a bond in due form, as required by law in such cases, and petitioner also herewith tenders an assignment of errors to the judgment of the said supreme court of Tennessee in the above-mentioned case against your petitioner; prays, etc.

METCALF & WALKER,
TURLEY & WRIGHT,
Sol's for Petitioner.

Filed August 2d, 1892.

JOHN B. CLOUGH, *Clerk.*
W. B. WEISIGER, *D. C.*

Filed August 16, 1892.

JOHN W. BUFORD, *Clk.*
By J. W. BUFORD, Jr., *D. C.*

2197 *Assignment of Errors.*

First. That said supreme court of Tennessee affirmed the decree of the chancery court of Shelby county, Tennessee, wherein said last-mentioned court refused, upon the petition of certain of the defendants therein, to remove said cause to the circuit court of the United States for the western district of Tennessee, at Memphis, Tennessee.

Said supreme court of Tennessee should have reversed said ruling of said chancery court of Shelby county, Tennessee, and should have remanded the case to that court with instructions to enter an order declining to take further jurisdiction of the case for the reason that the cause had been removed to the said circuit court of the United States.

Second. That said supreme court of Tennessee found and held that the transactions mentioned in the record between Thomas & Tracy, receivers, through their agent, Fellows, on the one side, and the firm of Jones Bros., on the other, did not constitute or amount to a violation of the act of Congress entitled An act to regulate commerce, approved February 4th, 1887, and the acts amendatory thereof.

It should have been held that the contracts evidenced by the bills of lading on file were illegal and that no recoveries could be had thereon; that the said receivers were, at most, bailees of the cottons in question, and that recoveries could be had against them only in the relation of bailees, the right of such recovery being negatived by the record and denied by the said supreme court.

TURLEY & WRIGHT,
METCALF & WALKER, *Sol's, &c.*

Filed Aug. 16, 1892.

J. W. BUFORD, *Clk*,
By J. W. BUFORD, JR., *D. C.*

2198 UNITED STATES OF AMERICA:

To the Insurance Company of North America of Philadelphia, the Atlantic Mutual Insurance Company of New York, the Providence Washington Insurance Company, the Phenix Insurance Company, the China Mutual Insurance Company, the British & Foreign Insurance Company, the Marine Insurance Company, Limited, of London; the Delaware Mutual Safety Insurance Company, Anthony J. Thomas & Charles E. Tracy, receivers of the Cairo division of the Wabash & Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October, 1892, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Tennessee, at Jackson, Tennessee, wherein The Merchants' Cotton Press & Storage Company, of Memphis is plaintiff in error and you are defendants in error, to show cause, if there be any, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Peter Turney, chief justice of the supreme court of the State of Tennessee, this the 10th day of Aug., 1892.

P. TURNEY,
Chief Justice of Supreme Court of Tennessee.

Service of citation waived.

TAYLOR & CARROLL,
Att'ys for Def'ts in Error.

Filed Aug. 16, 1892.

J. W. BUFORD, *Clk*,
By J. W. BUFORD, JR., *D. C.*

2199 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Tennessee, before you or some of you, at Jackson, Tennessee, being the highest court of law or equity of the said State in which a decision could be had in said suit between The Insurance Company of North America of Philadelphia, The Atlantic Mutual Insurance Company of New York, The Providence Washington Insurance Company, The Phenix Insurance Company, The China Mutual Insurance Company, The British & Foreign Insurance Company, The Marine Insurance Company (Limited) of London, The Delaware Mutual Safety Insurance Company, Anthony J. Thomas and Charles E. Tracy, receivers of the Cairo division of the Wabash & Pacific Railroad Company, complainants, and The Continental Insurance Company of New York, The Liverpool, London & Globe Insurance Company of England, The Fire Association, The New York Mutual Fire Insurance Company of New York, The National Fire Insurance Company of Connecticut, The Royal Insurance Company of England, and the Merchants' Cotton Press & Storage Company of Memphis, defendants, wherein was drawn in question the construction of a clause of the Constitution and a statute of the United States and the decision was against the title, right,
2200 privilege, or exemption specially set up or claimed under such clause of the said Constitution and statute, a manifest error hath happened, to the great damage of the said Merchants' Cotton Press and Storage Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Circuit Court of the United States for the District of West Tennessee.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court at Memphis, Tennessee, the 2d day of August, A. D. 1892.

JOHN B. CLOUGH, *Clerk*,
By W. B. WEISIGER, *Deputy*.

Filed August 16, 1892.

J. W. BUFORD, *Clerk*,
By J. W. BUFORD, JR., *D. C.*

2201 In the Supreme Court of the State of Tennessee, at Jackson, Tennessee.

THE INSURANCE CO. OF NORTH AMERICA OF PHILADELPHIA *et al.*
vs.
THE DELAWARE MUTUAL SAFETY INSURANCE COMPANY *et al.*

Know all men by these presents that we, The Merchants' Cotton Press and Storage Company of Memphis, principal, and Napoleon Hill, S. R. Montgomery, and W. J. Crawford, sureties, are held and firmly bound unto the said Insurance Company of North America of Philadelphia, The Atlantic Mutual Insurance Company of New York, The Providence Washington Insurance Company, The Phœnix Insurance Company, The China Mutual Insurance Company, The British and Foreign Insurance Company, The Marine Insurance Company, Limited, of London, The Delaware Mu-
2202 tual Safety Insurance Company, Anthony J. Thomas and Chas. Tracy, receivers of the Cairo division of the Wabash & Pacific Railroad Company, in the sum of one hundred and thirty-five thousand dollars, to be paid to them; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 2nd day of Aug., 1892, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas the above-named Merchants' Cotton Press & Storage Company has prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment rendered against it in the above-entitled action by said supreme court of Tennessee:

Now, therefore, the condition of this obligation is such
2203 that if the above-named Merchants' Cotton Press and Storage Company shall prosecute said writ of error to effect and shall answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

MERCHANTS' COTTON PRESS
AND STORAGE CO.,
By NAPOLEON HILL, *President.*
NAPOLEON HILL, *Surety.*
S. R. MONTGOMERY, *Surety.*
W. J. CRAWFORD. *Surety.*

Witness:
C. W. METCALF &
J. M. FOWLKES.

I think the sureties on the above bond are good for the penalty of it.

JULIUS A. TAYLOR.

The above bond is approved this Aug. 10th, 1892.

P. TURNEY,
2204 *Chief Justice of Supreme Court of Tennessee.*

Filed Aug. 16th, 1892.

J. W. BUFORD, *Clerk*,
By J. W. BUFORD, JR., *D. C.*

2205 To the honorable Supreme Court of the United States:

Your petitioner, The National Fire Insurance Company of Connecticut, prays that a writ of error may issue to the honorable supreme court of Tennessee, at Jackson, directing said court to send to this court the record of the case of The Insurance Company of North America of Philadelphia *et al. vs.* The Deleware Mutual Safety Insurance Company *et al.*, to the end that the several and separate judgment rendered against your petitioner may be reviewed and reversed and such judgment ordered in respect to your petitioner in the case aforesaid as of right ought to be ordered.

Your petitioner tenders herewith a bond in due form as required by law in such cases, and petitioner also herewith tenders an assignment of errors to the judgment of the said supreme court of Tennessee in the above-mentioned case against your petitioner, and prays, etc.

TURLEY & WRIGHT,
METCALF & WALKER,
Sol's for Petitioner.

Filed Aug. 16th, 1892.

JNO. W. BUFORD, *Clk*,
By J. W. BUFORD, JR., *D. C.*

2206 *Assignment of Errors.*

First. That said supreme court of Tennessee affirmed the decree of the chancery court of Shelby county, Tennessee, wherein said last-mentioned court refused upon the petition of this plaintiff in error and other petitioners to remove said cause to the circuit court of the United States for the western district of Tennessee, at Memphis, Tennessee.

Said supreme court of Tennessee should have reversed said ruling of said chancery court of Shelby county, Tennessee, and should have remanded the case to that court with instructions to enter an order declining to take further jurisdiction of the case for the reason that the cause had been removed to the said circuit court of the United States.

Second. That said supreme court of Tennessee found and held that the transactions mentioned in the record between Thomas & Tracy, receivers, through their agent, Fellows, on the one side and the firm of Jones Bros. on the other did not constitute or amount to a violation of the act of Congress entitled An act to regulate commerce, approved February 4th, 1887, and the acts amendatory thereof.

It should have been held that the contracts evidenced by the bills of lading on file were illegal, and that no recoveries could be had thereon; that the said receivers were, at most, bailees of the cottons in question, and that recoveries could be had against them

only in the relation of bailees, the right of such recovery being negatived by the record and denied by the said supreme court.

TURLEY & WALKER,
METCALF & WALKER, *Sol's, &c.*

2207 UNITED STATES OF AMERICA:

To The Insurance Company of North America of Philadelphia, The Atlantic Mutual Insurance Company of New York, The Providence Washington Insurance Company, The Phenix Insurance Company, The China Mutual Insurance Company, The British & Foreign Insurance Company, The Marine Insurance Company, Limited, of London, The Merchants' Cotton Press & Storage Company of Memphis, The Delaware Mutual Safety Insurance Company, Anthony J. Thomas and Charles E. Tracy, receivers of the Cairo division of the Wabash & Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October, 1892, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Tennessee, at Jackson, Tennessee, wherein The National Fire Insurance Company of Connecticut is plaintiff in error and you are the defendants in error, to show cause, if there be any, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Peter Turney, chief justice of the supreme court of the State of Tennessee, this the 10th day of Aug., 1892.

P. TURNEY,
Chief Justice Supreme Court of Tennessee.

Filed Aug. 16th, 1892.

JNO. W. BUFORD, *Clk*,
By J. W. BUFORD, *D. C.*

Service of citation waived.

TAYLOR & CARROLL,
Att'ys for Def'ts in Error.

2208 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Tennessee, before you or some of you, at Jackson, Tennessee, being the highest court of law or equity of the said State in which a decision could be had in said suit between The Insurance Company of North America of Philadelphia, The Atlantic Mutual Insurance Company of New York, The Providence Washington Insurance Company, The Phenix Insurance Company, The China Mutual Insurance Company, The British & Foreign Insurance Company, The Marine Insurance Company, Limited, of London, The

Merchants' Cotton Press & Storage Company of Memphis, The Delaware Mutual Safety Insurance Company, Anthony J. Thomas and Charles E. Tracy, receivers of the Cairo division of the Wabash & Pacific Railroad Company, complainants, and The Continental Insurance Company of New York, The Liverpool, London, & Globe Insurance Company of England, The Fire Association, The New York Mutual Fire Insurance Company of New York, The National Fire Insurance Company of Connecticut, The Royal Insurance Company of England, defendants, wherein was drawn in question the construction of a clause of the Constitution and of a statute of the United States and the decision was against the title, right, privilege, and
2209 exemption specially set up or claimed under such clause of the said Constitution and statute, a manifest error hath happened, to the great damage of the said National Fire Insurance Company of Connecticut, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, the 8th day of August, A. D. 1892, and 117th year of our American Independence.

{ Seal of the Circuit Court of the United States for the District of West Tennessee. }

JOHN B. CLOUGH, *Clerk*,
By W. B. WEISIGER, *Deputy*.

Filed Aug. 16th, 1892.

JNO. W. BUFORD, *Clk*,
By J. W. BUFORD, JR., *D. C.*

2210 In the Supreme Court of the State of Tennessee, at Jackson, Tennessee.

THE INSURANCE COMPANY OF NORTH AMERICA OF PHILADELPHIA *et al.*
vs.
THE DELAWARE MUTUAL SAFETY INSURANCE COMPANY *et al.*

Know all men by these presents that we, The National Fire Insurance Company of Connecticut, principal, and Colton Greene, surety, are held and firmly bound unto the said Insurance Company of North America of Philadelphia, The Atlantic Mutual Insurance

Company of New York, The Providence Washington Insurance Company, The Phœnix Insurance Company, The China Mutual Insurance Company, The British and Foreign Insurance
2211 Company, The Marine Insurance Co., Limited, of London, The Merchants' Cotton Press and Storage Company of Memphis, The Delaware Mutual Safety Insurance Company, Anthony J. Thomas and Charles E. Tracy, receivers of the Cairo division of the Wabash & Pacific Railroad Company, in the sum of five hundred dollars, to be paid to them; for the payment of which, well and truly to be made, we bind ourselves and each of us and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 8th day of Aug., in the year of our Lord one thousand eight hundred and ninety-two.

Whereas the above-named National Fire Insurance Company of Connecticut has prosecuted a writ of error from the Supreme
2212 Court of the United States to reverse the judgment rendered against it in the above-entitled action by the said supreme court of Tennessee:

Now, therefore, the condition of this obligation is such that if the above-named National Fire Insurance Company of Connecticut shall prosecute said writ of error to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

NATIONAL FIRE INSURANCE CO.
OF CONNECTICUT,
By METCALF & WALKER, *Att'ys.*
COLTON GREENE, *Surety.*

Acknowledged before me this the 8th day of August, 1892, and I certify the surety to be sufficient.

HUNSDON CARY,
United States Commissioner, Dist. of West Tennessee.

2213 Approved Aug. 10th, 1892.

P. TURNEY,
Ch. J. of Supreme Court of Tennessee.

Filed Aug. 16th, 1892.

JNO. W. BUFORD, *Clerk,*
By JNO. W. BUFORD JR., *D. C.*

2214 To the honorable Supreme Court of the United States:

Your petitioner, The Mutual Life Insurance Co. of New York, prays that a writ of error may issue to the honorable supreme court of Tennessee, at Jackson, directing said court to send to this court the record of the case of the Insurance Company of North America of Philadelphia *et al. vs.* The Delaware Mutual Safety Insurance Company *et al.*, to the end that the several and separate judgment rendered against your petitioner may be reviewed and

reversed and such judgment ordered in respect to your petitioner in the case aforesaid as of right ought to be ordered.

Your petitioner tenders herewith a bond in due form as required by law in such cases, and petitioner also herewith tenders an assignment of errors to the judgment of the said supreme court of Tennessee in the above-mentioned case against your petitioner, and prays, etc.

TURLEY & WRIGHT,
METCALF & WALKER,
Sol's for Petitioner.

Filed Aug. 16, 1892.

JNO. W. BUFORD, *Clerk*,
By JNO. W. BUFORD, JR., *D. C.*

2215 *Assignment of Errors.*

First. That said supreme court of Tennessee affirmed the decree of the chancery court of Selby county, Tennessee, wherein said last-mentioned court refused, upon the petition of this plaintiff in error and other petitioners, to remove said cause to the circuit court of the United States for the western district of Tennessee, at Memphis, Tennessee.

Said supreme court of Tennessee should have reversed said ruling of said chancery court of Shelby county, Tennessee, and should have remanded the case to that court, with instructions to enter an order declining to take further jurisdiction of the case, for the reason that the cause had been removed to the said circuit court of the United States.

Second. That said supreme court of Tennessee found and held that the transactions mentioned in the record between Thomas & Tracy, receivers, through their agent, Fellows, on the one side, and the firm of Jones Bros., on the other, did not constitute or amount to a violation of the act of Congress entitled An act to regulate commerce, approved February 4th, 1887, and the acts amendatory thereof.

It should have been held that the contracts evidenced by the bills of lading on file were illegal, and that no recovery could be had thereon; that the said receivers were, at the most, bailees of the cottons in question, and that recovery could be had against them only in the relation of bailees, the right of such recovery being negatived by the record and denied by the said supreme court.

TURLEY & WRIGHT,
METCALF & WALKER, *Sol's, &c.*

2216 UNITED STATES OF AMERICA:

To The Insurance Company of North America of Philadelphia, The Atlantic Mutual Insurance Company of New York, The Providence Washington Insurance Company, The Phenix Insurance Company, The China Mutual Insurance Company, The British & Foreign Insurance Company, The Marine Insurance Company, Limited, of London, The Merchants' Cotton Press & Storage Company of Memphis, The Deleware Mutual Safety Insurance Company, Anthony J. Thomas and Charles B. Tracy, receivers of the Cairo division of the Wabash & Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October, 1892, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Tennessee, at Jackson, Tennessee, wherein The Mutual Fire Insurance Company of New York is plaintiff in error and you are defendants in error, to show cause, if there be any, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Peter Turney, chief justice of the supreme court of the State of Tennessee, this the 10th day of Aug., 1892.

P. TURNEY,
Chief Justice of the Supreme Court of Tennessee.

Filed Aug. 16th, 1892.

JNO. W. BUFORD, *Clk.*
By J. W. BUFORD, JR., *D. C.*

Service of citation waived.

TAYLOR & CARROLL,
Att'ys for Def'ts in Error.

2217 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Tennessee before you, or some of you, at Jackson, Tennessee, being the highest court of law or equity of the said State in which a decision could be had in said suit between The Insurance Company of North America of Philadelphia, The Atlantic Mutual Insurance Company of New York, The Providence Washington Insurance Company, The Phenix Insurance Company, The China Mutual Insurance Company, The British & Foreign Insurance Company, The Marine Insurance Company, Limited, of London, The Merchants' Cotton Press & Storage Company of Memphis, The Deleware Mutual Safety Insurance Company, Anthony J. Thomas and Charles E. Tracy, receivers of the Cairo division of the Wabash & Pacific Railroad Company, complainants, and The Continental

Insurance Company of New York, The Liverpool, London & Globe Insurance Company of England, The Fire Association, The New York Mutual Fire Insurance Company of New York, The National Fire Insurance Company of Connecticut, The Royal Insurance Company of England, defendants, wherein was drawn in question the construction of a clause of the Constitution and of a statute of the United States, and the decision was against the title, right, privilege, or exemption
2218 specially set up or claimed under such clause of the said Constitution and statute, a manifest error hath happened, to the great damage of the said The Mutual Fire Insurance Company of New York, as by its complaint appear, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court the 8th day of August, A. D. 1892, and 117th year of our American Independence.

{ Seal of the Circuit Court of the United States for the District of West Tennessee. }

JOHN B. CLOUGH, *Clerk*,
By W. B. WEISIGER, *Deputy*.

Filed Aug. 16, 1892.

JNO. W. BUFORD, *Clk*,
By JNO. W. BUFORD, JR., *D. C.*

2219 In the Supreme Court of the State of Tennessee, at Jackson, Tennessee.

THE INSURANCE CO. OF N. AMERICA OF PHILADELPHIA *et al.*
vs.
THE DELAWARE MUTUAL SAFETY INSURANCE COMPANY *et al.*

Know all men by these presents that we, The Mutual Fire Insurance Company of New York, principal, and —— ——, surety, are held and firmly bound unto the said Insurance Company of North America of Philadelphia, the Atlantic Mutual Insurance Company of New York, the Providence Washington Insurance Company, the Phenix Insurance Company, the China Mutual Insurance Company, the British and Foreign Insurance Company,

the Marine Insurance Company, Limited, of London, the
2220 Merchants' Cotton and Storage Company of Memphis, the Delaware Mutual Safety Insurance Company, Anthony J. Thomas and Chas. E. Tracy, receivers of the Cairo division of the Wabash & Pacific Railroad Company, in the sum of ($500) five hundred dollars, to be paid to them; for the payment of which, well and truly to be made, we bind ourselves and each of us and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the — day of ——, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas the above-named Mutual Fire Insurance Company of New York has prosecuted a writ of error *from* the Supreme Court of the United States to reverse the judgment rendered against
2221 it in the above-entitled action by the said supreme court of Tennessee:

Now, therefore, the condition of this obligation is such that if the above-named Mutual Fire Insurance Company of New York shall prosecute said writ of error to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

MUTUAL FIRE INS. CO. OF NEW YORK,
By METCALF AND WALKER & TURLEY AND WRIGHT, *Att'ys.*

C. W. METCALF,
T. B. TURLEY, *Sureties.*

Acknowledged before me this the 8th day of August, 1892,
2222 and I certify the sureties to be sufficient.

HUNSDON CARY,
United States Commissioner, Dist. of West. Tennessee.

Approved Aug. 10th, 1892.

P. TURNEY,
Ch. J. Supreme Court of Tennessee.

Filed Aug. 16th, 1892.

JNO. W. BUFORD, *Clerk,*
By JNO. W. BUFORD, JR., *D. C.*

2223 To the honorable Supreme Court of the United States:

Your petitioner, The Continental Insurance Company of New York, prays that a writ of error may issue to the honorable supreme court of Tennessee, at Jackson, directing said court to send to this Court the record of the case of the Insurance Company of North America of Philadelphia *et al. vs.* The Deleware Mutual Safety Insurance Company *et al.*, to the end that the several and separate judgment rendered against your petitioner may be reviewed and reversed and such judgment ordered in respect to your petitioner in the case aforesaid as of right ought to be ordered.

Your petitioner tenders herewith a bond in due form as required by law in such cases, and petitioner also herewith tenders an assignment of errors to the judgment of the said supreme court of Tennessee in the above-mentioned case against your petitioner, and prays, etc.

TURLEY & WRIGHT,
METCALF & WALKER,
Sol's for Petitioner.

Filed Aug. 16th, 1892.

JNO. W. BUFORD, *Clk*,
By J. W. BUFORD, JR., *D. C.*

2224 *Assignment of Errors.*

First. That said supreme court of Tennessee affirmed the decree of the chancery court of Shelby county, Tennessee, wherein said last-mentioned court refused, upon the petition of this plaintiff in error and other petitioners, to remove said cause to the circuit court of the United States for the western district of Tennessee, at Memphis, Tennessee.

Said supreme court of Tennessee should have reversed said ruling of said chancery court of Shelby county, Tennessee, and should have remanded the case to that court, with instructions to enter an order declining to take further jurisdiction of the case for the reason that the cause had been removed to the said circuit court of the United States.

Second. That said supreme court of Tennessee found and held that the transactions mentioned in the record between Thomas & Tracy, receivers, through their agent, Fellows, on the one side, and the firm of Jones Bros., on the other, did not constitute or amount to a violation of the act of Congress entitled An act to regulate commerce, approved February 4th, 1887, and the acts amendatory thereof.

It should have been held that the contracts evidenced by the bills of lading on file were illegal and that no recovery could be had thereon; that the said receivers were, at the most, bailees of the cottons in question, and that recovery could be had against them only in the relation of bailees, the right of such recovery being negatived by the record and denied by the said supreme court.

TURLEY & WRIGHT,
METCALF & WALKER, *Sol's, &c.*

2225 UNITED STATES OF AMERICA:

To The Insurance Company of North America of Philadelphia, The Atlantic Mutual Insurance Company of New York, The Providence Washington Insurance Company, The Phenix Insurance Company, The China Mutual Insurance Company, The British & Foreign Insurance Company, The Marine Insurance Company, Limited, of London, The Merchants' Cotton Press & Storage Company of Memphis, The Deleware Mutual Safety Insurance Company, Anthony J. Thomas & Charles E. Tracy, receivers of the Cairo division of the Wabash & Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October, 1892, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Tennessee, at Jackson, Tennessee, wherein The Continental Insurance Company of New York is plaintiff in error and you are the defendants in error, to show cause, if there be any, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Peter Turney, chief justice of the supreme court of the State of Tennessee, this the 10th day of Aug., 1892.

P. TURNEY,
Chief Justice Supreme Court of Tennessee.

Filed Aug. 16, 1892.

JOHN W. BUFORD, *Clerk*,
By JNO. W. BUFORD, JR., *D. C.*

Service of citation waived.

TAYLOR & CARROLL,
Att'ys for Def'ts in Error.

2226 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the supreme court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Tennessee, before you or some of you, at Jackson, Tennessee, being the highest court of law or equity of the said State in which a decision could be had in said suit between The Insurance Company of North America of Philadelphia, The Atlantic Mutual Insurance Company of New York, The Providence Washington Insurance Company, The Phenix Insurance Company, The China Mutual Insurance Company, The British & Foreign Insurance Company, The Marine Insurance Company, Limited, of London, The Merchants' Cotton Press & Storage Company of Memphis, The Deleware Mutual Safety Insurance Company, Anthony J. Thomas and Charles E. Tracy, receivers of the Cairo division of the Wabash & Pacific Railroad Company, complainants, and The Continental Insurance Company of New York, The Liverpool, London and Globe

Insurance Company of England, The Fire Association, The New York Mutual Fire Insurance Company of New York, The National Fire Insurance Company of Connecticut, The Royal Insurance Company of England, defendants, wherein was drawn in question the construction of a clause of the Constitution and of a statute of the United States and the decision was against the title, right,
2227 privilege, or ex-tion specially set up or claimed under such clause of the said Constitution and statute, a manifest error hath happened, to the great damage of the said Continental Insurance Company of New York, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, the 8th day of August, A. D. 1892, and 117th year of our American Independence.

(Seal of the Circuit Court of the United States)
(for the District of West Tennessee.)

JOHN B. CLOUGH, *Clerk*,
By W. B. WEISIGER, *Deputy*.

Filed Aug. 16th, 1892.

JNO. W. BUFORD, *Clk*,
By J. W. BUFORD, JR., *D. C.*

2228 In the Supreme Court of Tennessee, at Jackson, Tennessee.

THE INSURANCE COMPANY OF N. AMERICA OF PHILADELPHIA *et al.*
vs.
THE DELAWARE MUTUAL SAFETY INSURANCE COMPANY *et al.*

Know all men by these presents that we, The Continental Insurance Company of New York, principal, and Colton Greene, surety, are held and firmly bound unto the said Insurance Company of North America of Philadelphia, The Atlantic Mutual Insurance Company of New York, The Providence Washington Insurance Company, The Phenix Insurance Company, The China Mutual Insurance Company, The British & Foreign Insurance Company,
2229 The Marine Insurance Company, Limited, of London, The Merchants' Cotton Press & Storage Company of Memphis, The Delaware Mutual Safety Insurance Company, Anthony J.

Thomas and Chas. E. Tracy, receivers of the Cairo division of the Wabash & Pacific Railroad Company, in the sum of five hundred dollars; to be paid to them, for the payment of which, well and truly to be made, we bind ourselves and each of us and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 8th day of Aug., in the year of our Lord one thousand eight hundred and ninety-two.

Whereas the above-named Continental Insurance Company of New York has prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment rendered against
2230 it in the above-entitled action by the said supreme court of Tennessee:

Now, therefore, the condition of this obligation is such that if the above-named Continental Insurance Company of New York shall prosecute said write of error to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

CONTINENTAL INSURANCE COMPANY
OF NEW YORK,
By METCALF AND WALKER, *Att'ys.*
COLTON GREENE, *Surety.*

Acknowledged before me this the 8th day of August, 1892, and I certify the sureties to be sufficient.

HUNSDON CARY,
United States Commissioner, Dist. of West Tennessee.

2231 Approved Aug. 10th, 1892.

P. TURNEY,
Ch. J. Supreme Court of Tennessee.

Filed Aug. 16th, 1892.

JNO. W. BUFORD, *Clerk,*
By JNO. W. BUFORD, JR., *D. C.*

2231½ To the honorable Supreme Court of the United States:

Your petitioner, The Fire Association of New York, prays that a writ of error may issue to the honorable supreme court of Tennessee, at Jackson, directing said court to send to this court the record of the case of the Insurance Company of North America of Philadelphia *et al. vs.* The Delaware Mutual Safety Insurance Company *et al.* to the end that the several and separate judgment rendered against your petitioner may be reviewed and reversed and such judgment ordered in respect to your petitioner in the case aforesaid as of right ought to be ordered.

Your petitioner tenders herewith a bond in due form as required by law in such cases, and petitioner also herewith tenders an assignment of errors to the judgment of the said supreme court of

Tennessee in the above-mentioned case against your petitioner; and prays, etc.

TURLEY & WRIGHT,
METCALF & WALKER,
Sol's for Petitioner.

Filed Aug. 16, 1892. JNO. W. BUFORD, *Clk*,
By JNO. W. BUFORD, JR., *D. C.*

2232 *Assignment of Errors.*

First. That said supreme court of Tennessee affirmed the decree of the chancery court of Shelby county, Tennessee, wherein said last-mentioned court refused, upon the petition of this plaintiff in error and other petitioners, to remove said cause to the circuit court of the United States for the western district of Tennessee, at Memphis, Tennessee.

Said supreme court of Tennessee should have reversed said ruling of said chancery court of Shelby county, Tennessee, and should have remanded the case to that court with instructions to enter an order declining to take further jurisdiction of the case for the reason that the cause had been removed to the said circuit court of the United States.

Second. That said supreme court of Tennessee found and held that the transactions mentioned in the record between Thomas & Tracy, receivers, through their agent, Fellows, on the one side, and the firm of Jones Bros., on the other, did not constitute or amount to a violation of the act of Congress entitled An act to regulate commerce, approved February 4th, 1887, and the acts amendatory thereof.

It should have been held that the contracts evidenced by the bills of lading on file were illegal, and that no recovery could be had thereon; that the said receivers were, at the most, bailees of the cottons in question, and that recovery could be had against them only in the relation of bailees, the right of such recovery being negatived by the record and denied by the said supreme court.

TURLEY & WRIGHT,
METCALF & WALKER, *Sol's.*

2233 UNITED STATES OF AMERICA:

To the Insurance Company of North America of Philadelphia, the Atlantic Mutual Insurance Company of New York, the Providence Washington Insurance Company, the Phenix Insurance Company, the China Mutual Insurance Company, the British & Foreign Insurance Company, the Marine Insurance Company, Limited, of London, the Merchants' Cotton Press & Storage Company of Memphis, the Delaware Mutual Safety Insurance Company, Anthony J. Thomas and Charles E. Tracy, receivers of the Cairo division of the Wabash & Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on

the second Monday in October, 1892, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Tennessee, at Jackson, Tennessee, wherein The Fire Association of New York is plaintiff in error and you are defendants in error, to show cause, if there be any, why the judgments in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable P-ter Turney, chief justice of the supreme court of the State of Tennessee, this the 10th day of Aug., 1892.

P. TURNEY,
Chief Justice of the Supreme Court of Tennessee.

Filed Aug. 16, 1892.

JNO. W. BUFORD, *Clerk*,
By JNO. W. BUFORD, JR., *D. C.*

Service of citation waived.

TAYLOR & CARROLL,
Att'ys for Def'ts in Error.

2234 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Tennessee, before you or some of you, at Jackson, Tennessee, being the highest court of law or equity of the said State in which a decision could be had in said suit between The Insurance Company of North America of Philadelphia, The Atlantic Mutual Insurance Company of New York, The Providence Washington Insurance Company, The Phenix Insurance Company, The China Mutual Insurance Company, The British & Foreign Insurance Company, The Marine Insurance Company, Limited, of London, The Merchants' Cotton Press & Storage Company of Memphis, The Delaware Mutual Safety Insurance Company, Anthony J. Thomas and Charles E. Tracy, receivers of the Cairo division of the Wabash & Pacific Railroad Company, complainants, and The Continental Insurance Company of New York, The Liverpool, London & Globe Insurance Company of England, The Fire Association, The New York Mutual Fire Insurance Company of New York, The National Fire Insurance Company of Connecticut, The Royal Insurance Company of England, defendants, wherein was drawn in question the construction of a clause of the Constitution and of a statute of the United States and the decision was against the title, right,
2235 privilege, or exemption specially set up or claimed under such clause of the said Constitution and statute, a manifest error hath happened, to the great damage of the said Fire Association of New York, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal,

distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, the 8th day of August, A. D. 1892, and 117th year of our American Independence.

{ Seal of the Circuit Court of the United States for the District of West Tennessee. }

JOHN B. CLOUGH, *Clerk*,
By W. B. WEISIGER, *Deputy*.

Filed Aug. 16, 1892.

JNO. W. BUFORD, *Clk*,
By JNO. W. BUFORD, JR., *D. C.*

2236 In the Supreme Court of the State of Tennessee, at Jackson, Tennessee.

THE INSURANCE COMPANY OF N. AMERICA OF PHILADELPHIA *et al.*
vs.
THE DELAWARE MUTUAL SAFETY INSURANCE COMPANY *et al.*

Know all men by these presents that we, The Fire Association of New York, principal, and C. W. Metcalfe & T. B. Turley, sureties, are held and firmly bound unto the said Insurance Company of North America of Philadelphia, The Atlantic Mutual Insurance Company of New York, The Providence Washington Insurance Company, The Phenix Insurance Company, The China Mutual Insurance Company, The British & Foreign Insurance Company, The Marine Insurance Company, Limited, of London, The
2237 Merchants' Cotton Press & Storage Company of Memphis, The Delaware Mutual Safety Insurance Company, Anthony J. Thomas and Chas. E. Tracy, receivers of the Cairo division of the Wabash & Pacific Railroad Company, in the sum of ($500.00) five hundred dollars, to be paid to them; for the payment of which, well and truly to be made, we bind ourselves and each of us and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 8th day of Aug., in the year of our Lord one thousand eight hundred and ninety-two.

Whereas the above-named Fire Association has prosecuted a writ of error from the Supreme Court of the United States to reverse the

judgment rendered against it in the above-entitled action by
2238 the said supreme court of Tennessee:

Now, therefore, the condition of this obligation is such that if the above-named Fire Association shall prosecute said writ of error to effect and answer all costs if it shall fail to make good its plea, then the obligation shall be void; otherwise to remain in full force and effect

FIRE ASSOCIATION OF NEW YORK,
By METCALF AND WALKER, *Att'ys.*
TURLEY AND WRIGHT, *Att'ys.*
C. W. METCALF, } *Sureties.*
T. B. TURLEY, }

Acknowledged before me this the 8th day of August, 1892, and I certify the sureties to be sufficient.

HUNSDON CARY,
United States Commissioner, District of West Tennessee.

Approved August 10th, 1892.

2239 P. TURNEY,
Chief Justice of Supreme Court of Tennessee.

Filed Aug. 16th, 1892.

JNO. W. BUFORD, *Clerk,*
By JNO. W. BUFORD, JR., *D. C.*

2240 To the honorable Supreme Court of the United States:

Your petitioner, The Liverpool, London and Globe Insurance Company of England, prays that a writ of error may issue to the honorable supreme court of Tennessee, at Jackson, directing said court to send to this court the record of the case of The Insurance Company of North America of Philadelphia *et al. vs.* The Delaware Mutual Safety Insurance Company *et al.*, to the end that the several and separate judgment rendered against your petitioner may be reviewed and reversed and such judgment ordered in respect to your petitioner in the case aforesaid as of right ought to be ordered.

Your peti-oner tenders herewith a bond in due form, as required by law in such cases, and petitioner also herewith tenders an assignment of errors to the judgment of the said supreme court of Tennessee in the above-mentioned case against your petitioner, and prays, etc.

TURLEY & WRIGHT,
METCALF & WALKER,
Sol's for Petitioner.

Filed August 16, 1892.

JNO. W. BUFORD, *Clk,*
By JNO. W. BUFORD, JR., *D. C.*

2241 *Assignment of Errors.*

First. That said supreme court of Tennessee affirmed the decree of the chancery court of Shelby county, Tennessee, wherein said

last-mentioned court refused, upon the petition of this plaintiff in error and other petitioners, to remove said cause to the circuit court of the United States for the western district of Tennessee, at Memphis, Tennessee.

Said supreme court of Tennessee should have reversed said ruling of said chancery court of Shelby county, Tennessee, and should have remanded the case to that court with instructions to enter an order declining to take further jurisdiction of the case for the reason that the cause had been removed to the said circuit court of the United States.

Second. That said supreme court of Tennessee found and held that the transactions mentioned in the record between Thomas & Tracy, receivers, through their agent, Fellows, on the one side and the firm of Jones Bros. on the other did not constitute or amount to a violation of the act of Congress entitled An act to regulate commerce, approved February 4th, 1887, and the acts amendatory thereof.

It should have been held that the contracts evidenced by the bills of lading on file were illegal, and that no recoveries could be had thereon; that the said receivers were, at most, bailees of the cottons in question, and that recoveries could be had against them only in the relation of bailees, the right of such recovery being negatived by the record and denied by the said supreme court.

TURLEY & WRIGHT,
METCALF & WALKER, *Sol's, &c.*

2242 UNITED STATES OF AMERICA:

To the Insurance Company of North America of Philadelphia, the Atlantic Mutual Insurance Company of New York, the Providence Washington Insurance Company, the Phenix Insurance Company, the China Mutual Insurance Company, the British & Foreign Insurance Company, the Marine Insurance Company, Limited, of London, the Merchants' Cotton Press & Storage Company of Memphis, the Delaware Mutual Safety Insurance Company, Anthony J. Thomas and Charles E. Tracy, receivers of the Cairo division of the Wabash & Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October, 1892, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Tennessee, at Jackson, Tennessee, wherein The Liverpool, London & Globe Insurance Company of England is plaintiff in error and you are defendants in error, to show cause, if there be any, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Peter Turney, chief justice of the supreme court of the State of Tennessee, this the 10th day of Aug., 1892.

P. TURNEY,
Chief Justice of the Supreme Court of Tennessee.

Filed Aug. 16, 1892.

J. W. BUFORD, *Clk*,
By JNO. W. BUFORD, JR., *D. C.*

Service of citation waived.

TAYLOR & CARROLL,
Att'ys for Def'ts in Error.

2243 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Tennessee, before you or some of you, at Jackson, Tennessee, being the highest court of law or equity of the said State in which a decision could be had in said suit between The Insurance Company of North America of Philadelphia, The Atlantic Mutual Insurance Company of New York, The Providence Washington Insurance Company, The Phenix Insurance Company, The China Mutual Insurance Company, The British & Foreign Insurance Company, The Marine Insurance Company, Limited, of London, The Merchants' Cotton Press & Storage Company of Memphis, The Deleware Mutual Safety Insurance Company, Anthony J. Thomas and Charles E. Tracy, receivers of the Cairo division of the Wabash & Pacific Railroad Company, complainants, and The Continental Insurance Company of New York, The Liverpool, London and Globe Insurance Company of England, The Fire Association, The New York Mutual Fire Insurance Company of New York, The National Fire Insurance Company of Connecticut, The Royal Insurance Company of England, defendants, wherein was drawn in question the construction of a clause of the Constitution and of a statute of the United States and the decision was against the title, right,
2244 privilege, or ex-tion specially set up or claimed under such clause of the said Constitution and statute, a manifest error hath happened, to the great damage of the said Liverpool, London & Globe Insurance Company of England, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, the 8th

day of August, A. D. 1892, and 117th year of our American Independence.

(Seal of the Circuit Court of the United States)
(for the District of West Tennessee.)

JOHN B. CLOUGH, *Clerk*,
By W. B. WEISIGER, *Deputy*.

Filed Aug. 16, 1892.

JNO. W. BUFORD, *Clk*,
By JNO. W. BUFORD, JR., *D. C.*

2245 In the Supreme Court of the State of Tennessee, at Jackson, Tennessee.

THE INSURANCE COMPANY OF N. AMERICA OF PHILADELPHIA *et al.*
vs.
THE DELAWARE MUTUAL SAFETY INS. CO. *et al.*

Know all men by these presents that we, The Liverpool & London & Globe Insurance Company of England, principal, and Colton Greene, surety, are held and firmly bound unto the said Insurance Company of North America of Philadelphia, The Atlantic Mutual Insurance Company of New York, The Providence Washington Insurance Company, The Phenix Insurance Company, The China Mutual Insurance Company, The British & Foreign Insurance Company, The Marine Insurance Company, Limited, of Lon-
2246 don, The Merchants' Cotton Press & Storage Company of Memphis, The Delaware Mutual Safety Insurance Company Anthony J. Thomas and Chas. E. Tracy, receivers of the Cairo division of the Wabash & Pacific Railroad Company, in the sum of five hundred dollars, to be paid to them; for the payment of which, well and truly to be made, we bind ourselves and each of us and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 8th day of Aug., in the year of our Lord one thousand eight hundred and ninety-two.

Whereas the above-named Liverpool, London & Globe Insurance Company of England has prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment rendered against it in the above-entitled action by the said supreme court of Tennessee:

2247 Now, therefore, the condition of this obligation is such that if the above-named Liverpool, London & Globe Insurance Company of England shall prosecute said writ of error to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

LIVERPOOL AND LONDON AND GLOBE INS. CO. OF ENGLAND,
By METCALF AND WALKER, *Att'ys.*
COLTON GREENE, *Surety.*

Acknowledged before me this the 8th day of August, 1892, and I certify the sureties to be sufficient.

HUNSDON CARY,
United States Commissioner, Dist. of West Tennessee.

Approved Aug. 10th, 1892.

P. TURNEY,
2248 *Ch. J. Supreme Court of Tennessee.*

Filed Aug. 16th, 1892.

JNO. W. BUFORD, *Clerk*,
By JNO. W. BUFORD, JR., *D. C.*

2249 To the honorable Supreme Court of the United States:

Your petitioner, The Royal Insurance Company of England, prays that a writ of error may issue to the honorable supreme court of Tennessee, at Jackson, directing said court to send to this court the record of the case of The Insurance Company of North America of Philadelphia *et al. vs.* The Deleware Mutual Safety Insurance Company *et al.*, to the end that the several and separate judgment rendered against your petitioner may be reviewed and reversed and such judgment ordered in respect to your petitioner in the case aforesaid as of right ought to be ordered.

Your petitioner tenders herewith a bond in due form as required by law in such cases, and petitioner also herewith tenders an assignment of errors to the judgment of the said supreme court of Tennessee in the above-mentioned case against your petitioner, and prays, etc.

TURLEY & WRIGHT,
METCALF & WALKER,
Sol's for Petitioner.

Filed Aug. 16, 1892.

JNO. W. BUFORD, *Clk.*
By J. W. BUFORD, JR., *D. C.*

2250 *Assignment of Errors.*

First. That said supreme court of Tennessee affirmed the decree of the chancery court of Shelby county, Tennessee, wherein said last-mentioned court refused, upon the petition of this plaintiff in error and other petitioners, to remove said cause to the circuit court of the United States for the western district of Tennessee, at Memphis, Tennessee.

Said supreme court of Tennessee should have reversed said ruling of said chancery court of Shelby county, Tennessee, and should have remanded the case to that court with instructions to enter an order declining to take further jurisdiction of the case for the reason that the cause had been removed to the said circuit court of the United States.

Second. That said supreme court of Tennessee found and held that the transactions mentioned in the record between Thomas &

Tracy, receivers, through their agent, Fellows, on the one side and the firm of Jones Bros. on the other did not constitute or amount to a violation of the act of Congress entitled An act to regulate commerce, approved February 4th, 1887, and the acts amendatory thereof.

It should have been held that the contracts evidenced by the bills of lading on file were illegal, and that no recoveries could be had thereon; that the said receivers were, at most, bailees of the cottons in question, and that recoveries could be had against them only in the relation of bailees, the right of such recovery being negatived by the record and denied by the said supreme court.

TURLEY & WRIGHT,
METCALF & WALKER, *Sol's, &c.*

2251 UNITED STATES OF AMERICA:

To the Insurance Company of North America of Philadelphia, the Atlantic Mutual Insurance Company of New York, the Providence Washington Insurance Company, the Phenix Insurance Company, the China Mutual Insurance Company, the British & Foreign Insurance Company, the Marine Insurance Company, Limited, of London, the Merchants' Cotton Press & Storage Company of Memphis, the Deleware Mutual Safety Insurance Company, Anthony J. Thomas & Charles E. Tracy, receivers of the Cairo division of the Wabash & Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October, 1892, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Tennessee, at Jackson, Tennessee, wherein The Royal Insurance Company of England is plaintiff in error and you are the defendant- in error, to show cause, if there be any, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Peter Turney, chief justice of the supreme court of the State of Tennessee, this the 10th day of Aug., 1892.

P. TURNEY,
Chief Justice Supreme Court of Tennessee.

Filed Aug. 16, 1892.

JNO. W. BUFORD, *Clk*,
By JNO. W. BUFORD, JR., *D. C.*

Service of citation waived.

TAYLOR & CARROLL,
Att'ys for Def'ts in Error.

2252 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the

State of Tennessee, before you or some of you, at Jackson, Tennessee, being the highest court of law or equity of the said State in which a decision could be had in said suit between The Insurance Company of North America of Philadelphia, The Atlantic Mutual Insurance Company of New York, The Providence Washington Insurance Company, The Phenix Insurance Company, The China Mutual Insurance Company, The British & Foreign Insurance Company, The Marine Insurance Company, Limited, of London, The Merchants' Cotton Press & Storage Company of Memphis, The Delaware Mutual Safety Insurance Company, Anthony J. Thomas and Charles E. Tracy, receivers of the Cairo division of the Wabash & Pacific Railroad Company, complainants, and The Continental Insurance Company of New York, The Liverpool, London & Globe Insurance Company of England, The Fire Association, The New York Mutual Fire Insurance Company of New York, The National Fire Insurance Company of Connecticut, The Royal Insurance Company of England, defendants, wherein was drawn in question the construction of a clause of the Constitution and of a statute of the United States and the decision was against the title, right,
2253 privilege, and exemption specially set up or claimed under such clause of the said Constitution and statute, a manifest error hath happened, to the great damage of the said Royal Insurance Company of England, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, the 8th day of August, A. D. 1892, and 117th year of our American Independence.

Seal of the Circuit Court of the United States for the District of West Tennessee.

JOHN B. CLOUGH, *Clerk*,
By W. B. WEISIGER, *Deputy*.

Filed Aug. 16, 1892.

JNO. W. BUFORD, *Clk*,
By JNO. W. BUFORD, JR., *D. C.*

2254 In the Supreme Court of the State of Tennessee, at Jackson, Tennessee.

THE INSURANCE COMPANY OF NORTH AMERICA OF PHILADELPHIA *et al.*
vs.
THE DELAWARE MUTUAL SAFETY INSURANCE COMPANY *et al.*

Know all men by these presents that we, the Royal Insurance Company of England, principal, and Colton Green, surety, are held and firmly bound unto the said Insurance Company of North America of Philadelphia, the Atlantic Mutual Insurance Company of New York, the Providence Washington Insurance Company, the Phœnix Insurance Company, the China Mutual Insurance Company, the British & Foreign Insurance Company, the Marine Insur-
2255 ance Company, Limited, of London, the Merchants' Cotton Press & Storage Company of Memphis, the Delaware Mutual Safety Insurance Company, Anthony J. Thomas and Charles E. Tracy, receivers of the Cairo division of the Wabash & Pacific Railroad Company, in the sum of five hundred dollars, to be paid to them; for the payment of which, well and truly to be made, we bind ourselves and each of us and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the — day of ——, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas the above-named Royal Insurance Company of England has prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment rendered against it in the above-entitled action by the said supreme court of Tennessee:
2256 Now, therefore, the condition of this obligation is such that if the above-named Royal Insurance Company of England shall prosecute said writ of error to effect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

ROYAL INSURANCE CO. OF ENGLAND,
By METCALF AND WALKER, *Att'ys.*
COLTON GREEN, *Surety.*

Acknowledged before me this the 8th day of August, 1892, and I certify the surety to be sufficient.

HUNSDON CARY,
United States Commissioner, Dist. of West Tennessee.

Approved Aug. 10th, 1892.

P. TURNEY,
2257 *Ch. J. of Supreme Court of Tennessee.*

Filed Aug. 16th, 1892.

JNO. W. BUFORD, *Clerk.*
By JNO. W. BUFORD, JR., *D. C.*

THE STATE OF TENNESSEE:

I, John W. Buford, clerk of the supreme court of said State for the western division thereof, at Jackson, do hereby certify that the foregoing is a true, perfect, and complete copy of the record & proceedings in this court in the case of The Insurance Company of North America *et al.* against The Delaware Mutual Safety Ins. Co. *et al.*, as per agreement of counsel which is filed at the commencement of this said record as appears of record now on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court, at office, in the city of Jackson, on this the 27th day of August, A. D. 1892, and of the Independence of the United States the 117th year.

[Seal Supreme Court of Tennessee, Western Division, Jackson, Tenn.]

JNO. W. BUFORD, *Clerk*,
By ROBT B. LINDSEY, *D. C.*

2258 In Error to the Supreme Court of the State of Tennessee.

THE MERCHANTS' COTTON PRESS & STORAGE COMPANY, Plaintiff in Error, *vs.* THE INSURANCE COMPANY OF NORTH AMERICA *et al.* — No. 807.

THE NATIONAL FIRE INSURANCE COMPANY OF CONNECTICUT, Plaintiff in Error, *vs.* THE INSURANCE COMPANY OF NORTH AMERICA *et al.* — No. 808.

THE MUTUAL FIRE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, *vs.* THE INSURANCE COMPANY OF NORTH AMERICA *et al.* — No. 809.

THE CONTINENTAL INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, *vs.* THE INSURANCE COMPANY OF NORTH AMERICA *et al.* — No. 810.

THE FIRE ASSOCIATION OF NEW YORK, Plaintiff in Error, *vs.* THE INSURANCE COMPANY OF NORTH AMERICA *et al.* — No. 811.

THE LONDON, LIVERPOOL & GLOBE INSURANCE COMPANY, Plaintiff in Error, *vs.* THE INSURANCE COMPANY OF NORTH AMERICA *et al.* — No. 812.

THE ROYAL INSURANCE COMPANY OF ENGLAND, Plaintiff in Error, *vs.* THE INSURANCE COMPANY OF NORTH AMERICA *et al.* — No. 813.

2259 In this cause the parties stipulate as follows:

First. That the record below contains two bills of lading

issued by the Cairo, Vincennes & Chicago line—one for 100 bales, marked ETON, and one for 100 bales, marked ERVA—copies of which are hereto attached, marked, respectively, Exhibits "A" and "B," and that said copies may be filed and printed as part of the transcript herein, as though certified from the court below, upon a suggestion of diminution and certiorari.

Second. That the record in the court below contains a copy of the policy issued by the National Fire Insurance Company of Hartford, Conn., to the Merchants' Cotton Press & Storage Company; that a copy thereof (omitting the immaterial printed portions) is hereto annexed, marked Exhibit "C," and that said copy may be filed and printed as part of the transcript herein, as though certified from the court below, upon a suggestion of diminution and certiorari.

And it is agreed that all the other fire policies, a list of which is set forth in the original bill herein, held by the Merchants' Cotton Press & Storage Company, were, so far as material to this case, in like form with said Exhibit "C;" the others of said policies varying therefrom only in dates, amounts, and dates of expiration.

Third. In printing the bills of lading of the C., V. & C. line only Exhibit "A" to the original bill, page 132 of the Record, need be printed in full. As to all the other bills of lading issued by said line, the printed words at the head thereof, beginning with "in connection with" and ending with "Memphis, Tenn.," and the
2260 entire printed portion at the foot thereof, beginning with the words "marked and numbered as per margin" and ending with the words "without alteration or erasure," need not be printed, it being admitted that all the bills of lading of the said line in the respects aforesaid are in like form and terms as said exhibit.

Fourth. That the record below contains a tabulated statement produced by the witness W. R. Jones as part of his testimony, a copy of which is hereto appended as Exhibit "D;" that said witness testified that the same was made up from his books, and that said exhibit may be filed and printed as part of the transcript herein, as though certified from the court below, upon a suggestion of diminution and certiorari.

Fifth. That the record below contains the deposition of Ad. Storm, a copy of which is hereto annexed, marked Exhibit "E," and that said copy may be filed and printed as part of the transcript herein, as though certified from the court below, under a suggestion of diminution and certiorari.

Sixth. That this stipulation and exhibits thereto may be printed as part of the transcript herein.

JOHN M. BUTLER &
W. H. CARROLL,
For Defendants in Error.
S. P. WALKER,
T. B. TURLEY,
For Plaintiffs in Error.

2261 A.

No. 65.

Cairo, Vincennes & Chicago line.

MEMPHIS, *Oct.* 21, 1887.

Mark packages: C., V. & C. line.
Contents of *of* package unknown.
Received from Jones Bros. & Co. the following packages, contents unknown, in apparent good order, viz:

Marks.	Articles.	Weights. Subject to correction.
Jones. E T O N.	100 bales cotton.	49,120

To order, Chester, Pa.
Notify Edward H. Coates & Co., Philadelphia, Pa.
All rail.
Via B. & O. Cont'l line.
From Memphis to Chester, Pa.
Cotton per 100 lbs., 46½.

L. L. FELLOWS, *Agent.*

2262 B.

No. 77.

Cairo, Vincennes & Chicago line.

MEMPHIS, *Oct.* 26, 1887.

Mark packages: C., V. & C. line.
Contents of packages unknown.
Received from Jones Bros. & Co. the following packages, contents unknown, in apparent good order, viz:

Marks.	Articles.	Weights. Subject to correction.
E R V A. Jones.	100 bales cotton.	51,142

To order, Warren, R. I.
Notify Warren Manfg. Co., Warren, R. I.
All rail.
From Memphis to Warren, R. I.
Cotton per 100 lbs., 53½.

L. L. FELLOWS, *Agent.*

Exhibit No. 25 to W. R. Jones' dep.

2263 C.

No. 1328. $5,000.00.

The National Fire Insurance Company of Hartford, Conn.,

in consideration of ninety-five and $\frac{8}{100}$ dollars, do insure Merchants' Cotton Press & Storage Co. and their legal representatives five thousand dollars, as per the written and printed form attached and made part of this policy.

(Printed.)

On all cotton in bales received by them as agents for the benefit of railroads, transportation lines, or owners in the boundaries of the Merchants' Cotton Press & Storage Company's West Navy Yard compress, situate and bounded as follows: East by the west line of Fulton street, west by the Mississippi river, north by Auction street, and south by Market street.

The liability of the insurers is to begin on the receipt of said cotton on premises of the assured, as herein described, for compressing, and is to cease and terminate when removed from the platforms of the Merchants' Cotton Press & Storage Company for transportation.

The assured are allowed the privilege for mechanics to make all necessary alterations and repairs on said premises; are also allowed to run extra hours, as necessities of business may require, and are allowed to keep a suitable stock of oil and tallow for lubrication of machinery and for use in covered hand lanterns.

Notice of other insurance waived.

2264 For the term of three months from the 20th day of October, 1877, at 12 o'clock noon, to the 20th day of January, 1888, at 12 o'clock noon, against all such immediate loss of damage as may occur by fire to the property specified not exceeding the sum insured nor the interest of the assured in the property except as hereinafter provided, to be paid in sixty days after the proofs required by this company shall have been received at the office of the company, in Hartford, and the loss shall have been satisfactorily ascertained and proved as required by the provisions of this policy.

* * * * * * *

In witness whereof the National Fire Insurance Company of Hartford has caused these presents to be signed by its president and attested by its secretary in the city of Hartford and State of Connecticut.

M. HOWARD, *President.*

B. B. JAMES NICHOLS, *Secretary.*

Countersigned at Memphis, Tenn., this 20th day of October, 1887.

GREENE, MONTEDONICO & Co., *Agents.*

2265 Corrected.

Circular No. 850—Joint Committee.

OFFICE OF THE CHAIRMAN,
346 BROADWAY, NEW YORK, *Sept.* 15, 1887.

Rates on Cotton.

It has been agreed that, taking effect Monday, September 19th, 1887, the rates on cotton will be as follows:

Uncompressed, with Privilege to Carrier of Compressing.

From the points named below to New York, with the usual differences to other seaboard cities:

Memphis, Tenn.	50½	cents per 100 lbs.
St. Louis, Mo.	46½	" " "
Hannibal, Mo.	46½	" " "
East St. Louis, Ill.	42½	" " "
East Hannibal, Ill.	42½	" " "
Cairo, Ill.	44½	" " "
Mount Vernon, Ill.	42½	" " "
Shawneetown, Ill.	44½	" " "
Evansville, Ind.	42½	" " "
Louisville, Ky.	40½	" " "
Jeffersonville, Ind.	40½	" " "
New Albany, Ind.	40½	" " "
Cincinnati, Ohio.	36½	" " "
Chicago (on compressed cotton).	27	" " "

The cost of compressing at Memphis and Cairo will be 10 cents and at other points not to exceed 12½ cents per 100 lbs.

The Cairo line may accept as their proportion of through rate on Texas and Arkansas cotton coming to Cairo compressed 32 cents per 100 lbs., Cairo to New York.

The river-and-rail lines are to make the all-rail rate from Memphis, allowing as the divisions to be paid for boat rate, transfer, and insurance as follows:

2266 Memphis to Cairo.	10	cents per 100 lbs.
Memphis to Evansville and Mt. Vernon, Ind.	12	" " "
Memphis to Cincinnati.	14	" " "

The rail lines east from the Ohio River points above named to take as their divisions on compressed cotton from Memphis:

Cairo to New York.	30½	cents per 100 lbs.
Evansville to New York.	28½	" " "
Cincinnati to New York.	26½	" " "

ALBERT FINK, *Chairman.*

G. R. BLANCHARD,
Western Vice-chairman.

2267 D.

Bill of lading.	Date.	Mark.	No. bales.	Route.	Weight.	Bill lading, rate freight.	Tariff, rate freight.	Rebate.	This is what we term rebate or differences.
	1887.								
C., V. & C. line.	Oct. 21st	COMA	100	River & rail	50,017	53	55½	None	2½c. per 100 lb
"	" "	BUSY	100	River & rail	48,542	52½	55½	None	3c. "
"	" 22nd	DAYX	100	River & rail	50,063	53½	55½	None	2c. "
"	" 24th	CUNE	100	River & rail	49,380	52½	55½	None	3c. "
"	" 26th	EMIN	100	All rail	48,393	53½	55½	None	2c. "
"	" 21st	ETON	100	All rail	49,120	46½	48½	None	2c. "
"	" 26th	ERVA	100	All rail	51,142	53½	55½	None	2c. "
"	" 27th	DEDO	50	River & rail	25,107	52½	55½	None	3c. "
"	Nov. 3rd	EXOT	55	River & rail	26,954	53½	55½	None	2c. "
"	" "	EDON	50	River & rail	25,083	53½	55½	None	2c. "
"	" "	CURL	100	River & rail	48,836	53½	55½	None	2c. "
"	" "	EMAS	102	River & rail	49,842	53½	55½	None	2c.
"	" "	DONG	500	River & rail	246,047	53½	55½	None	2c.
"	" 4th	COLM	50	River & rail	24,733	53½	55½	None	2c.
"	" "	EIGH	50	River & rail	25,021	53½	55½	None	2c.
"	" "	JAH	48	River & rail	24,563	53½	55½	None	2c.
"	" "	BANA	100	River & rail	49,316	53½	55½	None	2c.
"	" 5th	CUBS	100	River & rail	49,048	53½	55½	None	2c.
"	" "	DOMX	100	River & rail	49,238	53½	55½	None	2c.
"	" 7th	SINA	25	River & rail	11,566	58½	60½	None	2c.
"	" "	DONN	100	All rail	48,720	52½	55½	None	3c.
"	" 8th	BOSM	100	River & rail	48,000	53½	55½	None	2c.
"	" "	BUSH	100	River & rail	49,294	53½	55½	None	2c.
2268	1887.								
C., V. & C. line.	Nov. 8th	COWS	100	River & rail	49,886	53½	55½	None	2c. per 100 lb
"	" "	EAST	100	River & rail	49,648	53½	55½	None	2c. "
"	" 9th	CENE	25	River & rail	11,853	55½	..	None	
"	" "	BANS	50	River & rail	25,244	53½	55½	None	2c. "
"	" 12th	CABE	125	River & rail	62,793	53½	55½	None	2c. "
"	" "	ENCO	50	River & rail	24,784	53½	55½	None	2c. "
"	" "	EDAS	50	River & rail	25,126	53½	55½	None	2c. "
"	" 14th	APLE	100	River & rail	48,291	53½	55½	None	2c. "
"	" "	DUCX	106	River & rail	51,859	53½	55½	None	2c. "
"	" "	BATE	100	River & rail	49,833	53½	55½	None	2c. "
"	" "	CORD	50	River & rail	25,196	59½	61½	None	2c. "
"	" "	BIJO	100	River & rail	50,370	53½	55½	None	2c. "
"	" "	ARTS	100	River & rail	51,150	53½	55½	None	2c. "
"	" "	ARMY	100	River & rail	50,793	53½	55½	None	2c. "
"	" "	AGES	100	River & rail	50,286	53½	55½	None	2c. "
"	" "	ASIA	100	River & rail	50,904	53½	55½	None	2c. "
"	" 15th	CAMP	50	River & rail	24,687	59½	61½	None	2c. "
"	" "	DUBB	100	River & rail	48,850	53½	55½	None	2c. "
"	" "	DASH	50	River & rail	25,059	53½	55½	None	2c. "
"	" "	SUIT	25	River & rail	12,118	58½	60½	None	2c. "
"	" "	BUZZ	100	River & rail	49,598	53½	55½	None	2c. "
"	Oct. 27th	DONO	50	River & rail	24,624	52½	55½	None	3c. "
"	Nov. 7th	BRIX	105	River & rail	51,644	53½	55½	None	2c. "
2269	1887.								
C., V. & C. line.	Nov. 7th	EVER	50	River & rail	24,072	53½	55½	None	2c. per 100 lb
"	" 9th	MADE	150	River & rail	73,478	53½	55½	None	2c. "
"	" 10th	ESTA	50	River & rail	25,517	53½	55½	None	2c. "
"	" 12th	HORN	100	River & rail	50,064	53½	55½	None	2c. "
"	" "	ENTE	50	River & rail	25,317	53½	55½	None	2c. "
"	" "	ESEP	50	River & rail	24,855	53½	55½	None	2c. "

2270 THE INSURANCE COMPANY OF NORTH AMERICA OF PHILADELPHIA *et al.*
vs.
THE DELAWARE MUTUAL SAFETY INSURANCE COMPANY *et al.*

The deposition of Ad. Storm, taken by defendant The Merchants' Cotton Press & Storage Company, at the office of Metcalf & Walker, this 29th day of February, 1892, in the presence of S. P. Walker, for defendant-, and Wm. H. Carroll, for plaintiffs, caption and formalities waived, but reserving objections as to relevancy and competency.

Q. 1. Please state where you live and in what business you are engaged.

A. I reside in Memphis, Tennessee, and am agent of the Anchor line of steamers.

Q. 2. Please state how long you have been a resident of Memphis, Tenn., and engaged as the agent of said line of steamers.

A. I have been a resident of Memphis thirty-three years. I have been connected with the Anchor line steamers twenty-six years.

Q. 3. Please state in a general way what you mean by the Anchor line steamers.

A. That is a line of steamers running between the ports of St. Louis, Vicksburg, Memphis, and New Orleans.

Q. 4. Are these steamers owned by a corporation or a voluntary association?

A. Owned by a corporation of the State of Missouri.

Q. 5. Do you remember the fire in the West Navy Yard compress on Nov. 17th, 1887?

A. I remember the fire. I don't know that I remember the date. It was in November, I think.

2271 Q. 6. Did you know L. L. Fellows, the agent of the C., V. & C. line at Memphis?

A. Yes, sir.

Q. 7. State, if you can, how the cottons covered by the bills of lading of the C., V. & C. line during that season were in general to be transported—that is to say, state in a general way, if you know, whether the C., V. & C. line habitually contracted to carry its cottons all rail or by river to Cairo and thence by rail.

A. They had been in the habit of going both ways—both river and rail—both. Our line had been in the habit of carrying their cottons; we carried it for several years.

Q. 8. Were you or not carrying cotton for the C., V. & C. line or do you know that the bills of lading were issued by the C., V. & C. line contemplating the carriage of cottons by your line of boats to Cairo during that season?

A. Well, there was cotton in the compress for which bills of lading were being issued, but I never knew who they gave a bill of lading to. I never knew the shipper of the cotton.

Q. 9. Did you or did you not understand at the time said fire occurred that there was a large amount of cotton accumulated in

the compress for shipment covered by bills of lading of the C., V. & C. line for shipment by the Anchor line to Cairo?

A. I knew there was a lot of cottons. The captain of a boat would wire me from below that he could take, say, 600 bales, and I would order Fellows to issue bills of lading for the amount.

Q. 10. Is that the only knowledge or understanding you have of the cottons in the press to be carried by the Anchor line?

2272 A. I never bothered myself about the cotton. I always gave orders to sign bills of lading for so much as the captain of the boat below would wire me that he could take. I never knew how much cotton he (Fellows) had in the press.

Q. 11. Please state in a general way whether at the time of said fire there was or was not a large amount of cottons in the press covered by the bills of lading of the C., V. & C. line which called for carriage by the Anchor line to Cairo.

A. I could not say what he had there, because I never asked him.

Q. 12. Did you have any interviews with Mr. Fellows before the fire as to whether you would or would not carry off his cottons? If you had such interviews please state the facts fully on that subject without further inquiry.

A. I do not remember how long it was before the fire, but it was some time before the fire. I told him that he could not calculate on our moving his cotton; that the water was so low, and that whenever we could move it—when we had a boat coming along that could take a few hundred bales—I would notify him. Boats coming from below always wired me if they could take any cotton, and I so notified Mr. Fellows to give me bills of lading for such amount as they could take.

Q. 13. Will you state as nearly as you can from memory the date at which you notified Mr. Fellows that you could not carry his cottons.

A. I think it was about a month or six weeks before the fire; a month, as well as I can remember, or six weeks, but I know it was some time before the fire.

Q. 14. Have you any means—books, letters, memoranda, or otherwise—of ascertaining the date of your interview with Mr. Fellows?

2273 A. No, sir; I went to his office several times.

Q. 15. Can you state why you went there several times?

A. Well, because he kept after me to move his cotton, and we could not; the water was so low and the amount of bales so few that we could carry. Whenever we had plenty of water we would take 1,800 or 1,900 bales.

Q. 16. You mean by one boat?

A. Yes, sir.

Q. 17. Was the low-water difficulty to which you refer a difficulty in getting into the press on that account, or was it a difficulty in carrying the cottons from Memphis to Cairo?

A. The river was very low between here and Vicksburg and from here to Cairo. We had a season like this last season.

Q. 18. How was it this last season to which you have referred?

A. We quit altogether in the middle of September on account of the water; we laid off till about two weeks ago or the first week in February.

Q. 19. Have you a receipt book or other book showing the amount of cottons that the Anchor line carried out of press No. 4?

A. I have Mr. Fellows' bill of lading book which he left but never called for.

Q. 20. With that book in your hand will you please state the lots of cotton carried by the Anchor line from press No. 4 during
2274 the period, assuming, if you please, that the fire occurred on the 17th of November, 1887.

A. We took from the 17th of October to November 7th 1,325 bales, as follows:

Oct. 17th. 674 bales went by barge # 2.
Oct. 24th. City of Vicksburg took 500 bales.
Nov. 7th. " " " 151 "

Q. 21. State what you were using the barge # 2 for and if other barges were used for carrying cottons at that time.

A. They having brought the barge to Memphis loaded with freight, we put cotton on it and sent it back to Cairo.

Q. 22. Please state whether or not it is true as a general fact that your boats for a period of about four to six weeks, as you have mentioned, before the fire were unable to carry cottons from Memphis to Cairo, and that Mr. Fellows was notified by you of that fact.

A. I so stated; yes, sir.

Q. 23. Did you more than once notify Fellows that he must not rely or count upon the Anchor line to carry off his cottons? State fully all that occurred between you and Fellows on this point.

A. I had repeatedly told Mr. Fellows that as soon as we had sufficient water we would move his cotton more rapidly.

Q. 24. Was there any fixed traffic arrangement between the C., V. & C. line and the Anchor line by which the latter was entitled to issue bills of lading for transportation by the Anchor line to Cairo? State fully the facts on this point.

A. We had no special contract for the cotton. We knew the rate to Cairo and we took it when we could.

2275 Cross-examination:

X Q. 1. What was the contract rate of freight from Memphis to Cairo?

A. The rate allowed by river was six cents a hundred pounds. The railroads made the rate and assigned a certain portion to boats. They allowed six cents a hundred pounds.

X Q. 2. If you say there was any traffic arrangement, if in writing, file it.

A. No contract.

X Q. 3. How often did Fellows urge you to move C., V. & C. line cotton?

A. He knew when boats were due, and always wanted to know how much we could take.

AD. STORM.

Oath waived.

2276 [Endorsed:] Case No. 15,133, &c. Supreme Court U. S., October term, 1893. Term No. 807 to 813, incl. The Merchants' Cotton Press Storage Co., P. E., *vs.* The Ins. Co. of North America *et al.* Stipulation and addition to record. Filed Nov. 22, 1893.

2277 Error to the Supreme Court of the State of Tennessee.

THE MERCHANTS' COTTON PRESS & STORAGE COMPANY, Plaintiff in Error, *vs.* THE INSURANCE COMPANY OF NORTH AMERICA *et al.* — No. 807.

THE NATIONAL FIRE INSURANCE COMPANY OF CONNECTICUT, Plaintiff in Error, *vs.* THE INSURANCE COMPANY OF NORTH AMERICA *et al.* — No. 808.

THE MUTUAL FIRE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, *vs.* THE INSURANCE COMPANY OF NORTH AMERICA *et al.* — No. 809.

THE CONTINENTAL INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, *vs.* THE INSURANCE COMPANY OF NORTH AMERICA *et al.* — No. 810.

THE FIRE ASSOCIATION OF NEW YORK, Plaintiff in Error, *vs.* THE INSURANCE COMPANY OF NORTH AMERICA *et al.* — No. 811.

THE LONDON, LIVERPOOL & GLOBE INSURANCE COMPANY, Plaintiff in Error, *vs.* THE INSURANCE COMPANY OF NORTH AMERICA *et al.* — No. 812.

2278 THE ROYAL INSURANCE COMPANY OF ENGLAND, Plaintiff in Error, *vs.* THE INSURANCE COMPANY OF NORTH AMERICA *et al.* — No. 813.

In these several causes it is agreed by and between Samuel P. Walker and T. B. Turley, of counsel for the plaintiffs in error, appearing in that behalf, and John M. Butler and William H. Carroll, of counsel for defendants in error, appearing in that behalf, that the following parts of the transcript of the record of the supreme court of Tennessee *is* to be printed for the Supreme Court of the United States:

1. The original bill of The Insurance Company of North America *et al. vs.* The Delaware Mutual Insurance Company *et al.* (p. 4), with the fiat of the judge (p. 44), the writ of attachment, the return (p.

310) thereon, and the garnishment served thereunder (p. 317). Of the exhibits to the said bill only the bill of lading covering 150 bales of cotton marked MADE, with Jones underneath (p. 132); 50 bales marked DOXO, with Jones underneath (p. 133); 100 bales marked EMIN (p. 224); 100 bales marked DONN (p. 227), and 100 bales marked HORN, with Jones underneath (p. 134), and the marine policy of insurance granted by the Phœnix Insurance Company to R. H. Deming & Co. need be copied.

2. The answer of the Delaware Insurance Company (Record, page 252) and the cross-bill of Thomas & Tracy, receivers, filed August 7th, 1891, Exhibit "A" thereto, Exhibit 51 (Record, page 296) and Exhibit 52 thereto (Record, page 298), and list of defendant fire insurance companies (Record, 314).

2279 3. The answer of R. H. Deming & Company and the Phœnix Insurance Company, and the cross-bill filed August 12th, 1891, the fiat of the judge (Record, page 345), the writ of attachment (Record, page 397), and the returns of the sheriff thereon, including all garnishments (Record, pages 400 to 435, inclusive), served under said attachments.

4. The original petition for removal, filed September 5th, 1891. (Record, pages 561 to 568.)

5. The amended bill of complaint, filed September 22nd, 1891. (Record, page 449.)

6. The answer and cross-bill of Anthony J. Thomas and Charles E. Tracy, receivers, filed 24th of September, 1891. (Record, page 474.)

7. Order approving bond for removal. (Record, page 550.)

8. Amended petition for removal, filed 21st November, 1891. (Record, page 571.)

9. Order of L. H. Estes, allowing amendment of the petition. (Record, page 579.)

10. Answer and cross-bill of the Marine Insurance Company of London, filed 10th of December, 1891. (Record, page 582.)

11. Answer and cross-bill of the British & Foreign Insurance Company, filed December 10th, 1891. (Record, page 602.)

12. Order of L. H. Estes of December 8th, 1891, on petition of the fire insurance companies for removal. (Record, page 628.)

13. Answer, demurrer, and cross-bill of the N. N. & M. V. Co., filed December 31st, 1891. (Record, page 631.)

14. Answer and demurrer of the Merchants' Cotton Press & Storage Company and Napoleon Hill and others, filed December 31st, 1891. (Record, page 648.)

2280 15. Answer and demurrer of the fire insurance companies, filed 2nd of January, 1892. (Record, page 720.)

16. Copy of the decree appointing Thomas and Tracey receivers. (Record, page 785.)

17. Copy of order authorizing receivers to use the name of the C., V. & C. line. (Record, page 792.)

18. Tariff of freight rates issued by Blanchard and Fink, taking effect September 19th, 1887. (P. 849.)

19. Proof of loss and agreement with the Phenix Insurance Com-

pany February 23rd, 1892, leaving off exhibits thereto. (Record, page 852.)

20. Statements of collections by the compress company from the fire insurance companies. (Record, page 1121.)

21. Statements of collections by the compress company from the fire insurance companies on account of attorneys' fees. (Record, page 1124.)

22. Statements of amounts paid by Merchants' Cotton Press & Storage Company on judgments rendered in the supreme court of Tennessee. (Record, page 1127.)

23. Letter from the German Fire Insurance Company of Wheeling to Messrs. Metcalf & Walker and the letter of that firm transmitting the same to Taylor & Carroll. (Record, page 1131.)

24. Final decree and appeal. (Record, page 1165.)

25. The following questions and answers of the witness W. R. Jones and none other:

The first question propounded to W. R. Jones by Mr. W. H. Carroll and his answer thereto, and the following questions and answers:

2281 Q. Did you have an agreement with Mr. Fellows as agent of the C., V., & C. line regarding the transportation of the several lots of cotton covered by the 34 bills of lading of the C., V. & C. line exhibited with Deming's bill and referred to in your answer to Int. 14 in chief further than is shown by the bills of lading?

Ans. Yes, sir; I had a further contract with him to pay me rebates. I mean he paid our firm rebates.

Q. Please state what rebates he paid you or was to pay you.

Ans. Some of the bills of lading were issued at a less rate than the Boston rates of those dates, and on others he paid me cash rebates.

Q. Do you know or can you state approximately the amount of money received by your firm on those rebates from Mr. Fellows?

Ans. I think I could say by reference to our books.

Q. Then please look at your books and file a statement of those rebates showing the amount thereof under your Fellows contracts.

Ans. Fellows and Rogers were both working on the same line and both paying rebates.

Q. In your direct examination you have spoken of the fact that the C., V. & C. line was giving you a lower rate of freight than the all-rail routes to the East, and that in some instances the actual rate of freight would be shown by the bill of lading, and in others the line would issue a bill of lading showing one rate, but make

2282 you a cash rebate. Please go over all the bills of lading of the C., V. & C. line exhibited with your testimony in this case and put over your initials on the back of the bill of lading a memorandum on the back of each bill of lading on which you were allowed the cash rebate, some words indicating the fact, "cash rebate" of so much.

Ans. I will as far as possible. I do not know that I can do it with absolute accuracy in each instance.

Q. What was the difference of the through rate from Memphis to

Eastern Mills or abroad on all-rail route and partially river via Cairo, and the balance rail to the mills or seaboard?

Ans. It varied some; hence, made a difference of two points, or 10 to 25 cents a bale; some of the roads were cutting rates.

Q. What was the difference at that time? I mean prior to the fire.

Ans. It was just as I had stated; some of the roads might make 10 cents a bale, others 25 cents in some cases; it was owing to the size of the lot you wanted to ship—the number of bales.

Q. What difference did the same line make by all-rail route and partially by river route to Cairo, and thence by rail?

Ans. If I understand, that is the question I have just answered, the one previous to this. I probably can explain it to you; the C., V. & C. line and the Cincinnati Packet Co. were both in the market for cotton shipping over the two lines. Mr. Lightburn might come to me, and if I would give him 1,000 bales give me 25c. a bale rebate; and Mr. Fellows, of the C., V. & C. line, might want to give me 10c.; of course I would accept the Lightburn rate, getting more money out of it.

2283 Q. What I am inquiring about is this: What difference did the same line make between its all-rail route and its partially river and partially rail route; for example, take the C., V. & C. line; it might ship out of Memphis by railroad, or ship from Memphis to Cairo by water, and then begin the rail transit; now what difference did that company make by all-rail transit and partial-rail transit?

Ans. No, sir; different; they might put it in the bills the same; but in some instances they paid, as I tell you, rebate.

Q. What was about the difference in charge made by the same line; for instance, the C., V. & C. line, where it bills cotton from Memphis to eastern markets all rail, and where it bills it partially by river and partially by rail?

Ans. I think they put it in their bills the same rate, but they generally pay a rebate on the river cotton.

Q. Now, what rebate did one line, say, carrying both ways, pay prior to the fire of November 17th, 1887?

Ans. I do not remember now; generally from 10 to 25 cents per bale.

Q. We understood you to say that the C., V. & C. line paid you a rebate of from two to five cents a 100 pounds on cotton you shipped over its lines?

Ans. Yes, sir; part of the time. You will find I said so somewhere else.

Q. Then, if I understand you, the route by river to Cairo and then east by rail was from 10 to 25c. per bale lower than by all rail; is that the idea?

Ans. Yes, sir; if they did not make that difference we would have shipped by all rail; it was faster.

2284 Q. What was the reason of this difference in rate between river and rail and all rail?

Ans. I presume it was to draw cotton over the river.

Q. The question is, Why did the same line make this difference on its two routes, one being all rail and the other partly by river and partly by rail?

Ans. I think they were connected with the Anchor Line steamers as part of their through route, and by rail I think they shipped by the C. & O.

Q. Was the Anchor line any more a part of their through route than the C. & O.?

Ans. Not that I know of; but they worked over that, and I do not know what arrangement they had.

Q. The question addressed to you is not at all connected with who made up and who did not make up and portion of their through route, but what was the reason of the difference in rate between the all-rail route and a route partially by river and rail?

Ans. To do business.

Q. Then you are aware of no other reason for such a difference?

Ans. No, sir.

Q. In making your freight arrangements or engagements with the different carriers what, if anything, was ever said between you and them about getting the best terms or the most favorable terms of shipment?

Ans. The only thing I remember of ever speaking about was the quantity of cotton I would give them if they would give me a low rate.

2285 Q. Then, if I understand you, the rate of freight as to Boston depends upon the amount of cotton that you gave them?

Ans. Very much; yes, sir.

Q. They would charge you a less rate of freight for a large amount of cotton than for a small amount?

Ans. Yes, sir; sometimes make my entire commissions by engaging 10,000 bales at a time.

Q. Was that the case prior to November 17th, 1887?

Ans. Yes, sir.

Q. And they actually made these differences in rate depending upon the amount of cotton shipped?

Ans. Yes, sir.

Q. Did they not charge their regular rate of freight?

Ans. They might have charged them in the face of the bills, but they gave a rebate according to the quantity of cotton.

Q. And that was the rule prior to the fire?

Ans. Yes, sir; I have had as high as $1.00 a bale rebate.

26. List of cotton furnished by Jones, deposited in the compress company, showing marks of each lot, bill of lading, and rate of freight as fixed by Blanchard & Fink.

27. The following interrogatories and cross-interrogatories and the answers thereto from the deposition of L. L. Fellows:

Q. State your name, age, present place of residence, and occupation; also state how you were engaged in the months of October and November, 1887, and where.

2286 Ans. My name is L. L. Fellows; my age is thirty-seven years; present place of residence, Indianapolis, Indiana; occupation,

agent of the Midland Fast Freight line. In October and November, 1887, I was general agent of Anthony J. Thomas and Charles E. Tracy, receivers of the Cairo division of the Wabash, St. Louis and Pacific railway, then known as the Cairo, Vincennes & Chicago line, at Memphis, Tennessee.

Q. State whether or not you made any arrangement at any time with the firm of Jones Bros. & Co., in order to get their cotton shipments, to give them cut rates of freight from Memphis to points East, and accepted from them receipts with stipulations contained in them of the Merchants' Cotton Press & Storage Co., and issued in lieu thereof bills of lading, having the knowledge that the Merchants' Cotton Press & Storage Co. had issued to its employees in charge of their press No. 4 an order to receive no more cotton for river shipment, because steamboats had failed to carry off cotton that was compressed and fully ready for shipment, and for which the C., V. & C. line had issued bills of lading for carriage by river to Cairo and thence East by rail, and thus contrived to delay and detain the cotton in the said press, where it was subsequently destroyed.

Ans. I never gave Jones Bros. & Co. any cut rate of freight from Memphis to points East. I never made any arrangement with the firm of Jones Bros. & Co. or with any other shippers at Memphis, in order to get their cotton for shipment, to give them a cut rate of freight from Memphis to points East. I never had any knowledge whatever that the Merchants' Cotton Press & Storage Company had issued to its employees in charge of their press No. 4 any order to receive no more cotton intended for river shipment. If any
2287 such order was ever issued by the Merchants' Cotton Press & Storage Company, I was not informed of it and never knew anything about it. I never in any way contrived or attempted to delay and detain cotton in the press. On the contrary, I continually tried my best to hasten cotton to its destination as rapidly as possible. Finding, when the cotton season fully opened, that on account of the low stage of water and scarcity of help, as I was informed by the steamboat lines, that it would be impracticable to get out the cotton by river transportation as fast as I desired to, I shipped a good deal of cotton by all-rail route, which I would otherwise have shipped by the river route, as the river route was the most direct and convenient connection with the C., V. & C. line, the southern terminus of which was at Cairo, Illinois. The Central Traffic Association, which I understood to be an association of the general freight agents of the various transportation lines, had agreed upon a fixed and regular tariff of freight rates from Memphis for cotton, said tariff covering the shipments of cotton both by all-rail routes and by what was called river and rail routes—that is, by river from Memphis to Cairo and thence East by rail. By the tariff agreed upon two cents per one hundred pounds of the through tariff rate was allowed for the expense of insuring cotton while en route by boat from Memphis to Cairo. The agreed tariff for the river and rail route, when the C., V. & C. line covered the cotton by insurance to protect it while being transported from Memphis to Cairo, was exactly the

same as the all-rail route. When the owners and consignees of the cotton, through their agents or shippers, assumed the insurance risk from Memphis to Cairo, and relieved the C., V. & C. line
2288 from the necessity of insuring the cotton while in transit from Memphis to Cairo, for its own protection I issued bills of lading to such shippers at the net freight tariff rate less the two cents per one hundred pounds allowed by the tariff for river insurance between Memphis and Cairo. This was no secret cut in rates, nor was it any cut in rates at all. By this arrangement the C., V. & C. line simply permitted the shippers to insure their own cotton while in transit from Memphis to Cairo. Many of the shippers, particularly Jones Bros. & Co., knew that their principals—the owners and consignees of the cotton—insured the cotton from the time it was brought until delivered at the Eastern destination in policies in Eastern insurance companies. The shippers, knowing this fact, agreed with the C., V. & C. line to assume the fire and marine risk from Memphis to Cairo and get the advantage of their principals of the two cents allowed for such insurance by the tariff rate rather than have the cotton doubly insured at the owner's expense while in transit from Memphis to Cairo. I had such an agreement with Jones Bros. & Co. and with other shippers. In all cases in which I had such an agreement for the shipper, owner, or consignee to assume the insurance risk from Memphis to Cairo I inserted such a provision and stipulation in the bill of lading, and in consequence of such stipulation took off from the through-freight rate two cents per one hundred pounds allowed by the tariff for insurance between Memphis and Cairo. In some of the bills of lading this stipulation was in the words "usual danger by fire and navigation excepted," or words to that effect, written in the face
2289 of the bill of lading. Later in the season I procured a stencil plate containing the following stipulation: "Via river to Cairo, marine and fire risk expressly assumed by shipper, owner, and consignee from Memphis until landed at Cairo, Illinois," and stamped that stipulation in the face of the bill of lading. To illustrate just what I mean by the foregoing answer as to freight rates I will take bill of lading No. 125, mentioned and described in interrogatory No. 30 and answer thereto. That bill of lading provided for the transportation of one hundred bales of cotton from Memphis to Millville, Mass., via river to Cairo. The regulart ariff rate for all-rail transportation from Memphis on that cotton would have been by the tariff fixed by the traffic association 55½ cents per one hundred pounds. In the bill of lading, instead of charging 55½ cents I charged 53½ cents, leaving off or deducting from the full all-rail tariff rate the two cents per one hundred pounds allowed for insurance between Memphis and Cairo.

Q. In the answer of the Royal Insurance Company *et al.* in the suit of R. H. Deming *et al.* against The Merchants' Cotton Press & Storage Company *et al.* it is alleged as follows:

"Further answering, respondents show, as has already been set up in that part of the answer of the Merchants' Cotton Press & Storage Company which has been adopted by these respondents

that the principal and primary business of the said Merchants' Cotton Press & Storage Company was compressing cotton; that its presses and sheds connected with them were never intended to be used for the storage of cotton except as incidental to the compressing of such cotton as might be delivered to it in good faith for immediate shipment—that is, shipment to be made
2290 as soon as it could be compressed and the cars were furnished for its transportation. The sheds connected with said presses were never intended for the ordinary storage of cotton, and this was well understood by all parties to this suit who delivered the cotton described herein to the Merchants' Cotton Press & Storage Company which was destroyed at the fire of November 17th, 1887. In order to facilitate its business of compressing, said Merchants' Cotton Press & Storage Company made a division of its work and each press had assigned to it the compressing of the cotton intended to be shipped over certain lines, and no cotton was allowed to be received in any press except the cotton intended for shipment over the line to which that press was assigned. In carrying out this plan the West Navy Yard compress No. 4 (in which there were two presses) was used in compressing the cotton intended for shipment over the Chesapeake, Ohio & Southwestern R. R. and by the river, and no other cotton was allowed to be received at this press or the sheds connected therewith."

"Some time before the fire by which the cotton in controversy was destroyed the steamboats had failed to carry off cotton that was compressed and fully ready for shipment and for which the C., V. & C. line had issued bills of lading for carriage to Cairo and thence East by rail. This failure to carry off cotton routed as aforesaid (viz., to Cairo by river and thence East by rail) had been so long continued and was so in violation of the general policy and purpose of permitting the press and its appurtenant shed to be used only for compressing and caring for cotton intended for immediate shipment that said compress had about — days before said
2291 fire issued an order to its employees in charge of said press to receive no more cotton intended for transportation by river. Thereafter the said firm of Jones Bros. & Co., in order to evade this order, sent a large amount of cotton, including the cotton herein sued for, into said press under permits issued by the agents of the Newport News & Mississippi Valley Co., said permits, as was well known to said Jones Bros. & Co., indicating that this cotton was to be transported by rail and not by river. After procuring said cotton to be received by said compress under the permits of said Newport News & Mississippi Valley Railroad Co., the said Jones Bros. & Co. procured and accepted bills of lading under which said cotton was to be transported by river to Cairo and thence East by rail. This course was taken by said Jones Bros. & Co. solely because the said Cairo, Vincennes & Chicago line gave them a lower rate of freight by the river-and-rail route aforesaid than was offered by any rail line. This lower rate of freight did not generally appear on the face of the bill of lading, but the result was accomplished by inserting the regular all-rail rate of freight in the

bill of lading and refunding to said Jones Bros. & Co. the amount of reduction agreed upon, called a rebate. This so-called rebate was thus realized in cash by the said Jones Bros. & Co. over and above the amount to which they were entitled under the contract between them and their consignees, to whom they sold the cotton for a fixed price per pound, free on board and freight added, the consignee paying the freight, as stated on the bill of lading, on delivery by the last carrier and said Jones Bros. & Co. getting or contracting for "a rebate" out of the freight money thus to be paid. The
2292 scheme involved a secret "cut" of freight rates, the amount of the cut to be realized by Jones Bros. & Co. over and above what they were rightfully entitled to.

Respondents further say that this plan of secret rebate by the carrier to Jones Bros. & Co. had been resorted to long before the issuing of this order by the said compress company to receive no more cotton for shipment by river; that the steamboats by which the cotton was to be carried to Cairo had refused to accept the rate of freight offered to them under said arrangement for a rebate to Jones Bros. & Co.; that solely because of the facts aforesaid the said cotton, although compressed and ready for shipment, was allowed to remain in the press and was there at the time of the said fire.

Respondents say that all the cotton received by said compress company after the issuing of the aforesaid order was procured to be received by the fraudulent contrivance aforesaid, and that such cotton, as well as the cotton received prior thereto, for which bills of lading for shipment by river were issued, were wrongfully delayed and detained in the press because of the acts and conduct aforesaid of Jones Bros. & Co. and because of the failure of both Jones Bros. & Co. and the transportation lines to make any provision for the transportation thereof after one had issued and the other had accepted bills of lading calling for transportation by river as aforesaid, and that for that reason only the cotton was subjected to destruction by said fire.

And respondents aver that said Jones Bros. & Co. well knew that the course adopted by them as aforesaid was resulting
2293 in a failure to carry off cotton and in its detention unshipped in the press.

Respondents state and show that their said policies were not intended to cover and did not cover said cotton which the Merchants' Cotton Press & Storage Company was thus deceptively and fraudulently misled into receiving into its press and sheds thereto attached. On the contrary, as already stated, they were intended to, and did in fact, cover only such cotton as was delivered for shipment to be made immediately after it was compressed, and which remained the property of the original owners, and for which no bills of lading issued, and upon which no other insurance had been taken out. This act was well known to said parties complainant, who thus deceptively procured said Merchants' Cotton Press & Storage Company to receive said cotton at its Navy Yard press."

Will you state whether these allegations are well or ill founded in whole or in part and give all the facts within your knowledge

as to them and any of them in response to this interrogatory just as though you were formally interrogated as to your knowledge in detail of the entire transaction as alleged to have existed and to which you are alleged to have been a party?

Ans. The averments in this interrogatory are not founded in fact. In so far as my knowledge extends, there is but very little, if any, truth in them. All of the bills of lading I ever issued at Memphis, as agent of the C., V. & C. line, were issued in perfect good faith and without any purpose or intention to use the compress
2294 sheds for storage purposes except while the cotton was awaiting compression and transportation. It was my purpose, as well as my interest as agent for the C., V. & C. line, to get the cotton in course of transit as rapidly as possible and to have as little delay as I possibly could have. I was repeatedly promised by the officers of the Anchor line that they would take cotton more rapidly, and was daily expecting to be able to get cotton out of the compress more rapidly, and was only delayed because of low water, which could not be foreseen when I made the engagements for the transportation of the cotton. Press No. 4, as I understood, was chiefly used in the handling of cotton to be transported by river. I further understood that there was a sort of understanding or agreement between the agents of the various transportation lines that such line should have about so much space in the compress company's buildings and sheds. I further understood that the space allotted to the C., V. & C. line would readily accommodate some five or six thousand bales of cotton. My purpose all the time was to get out the cotton and put it in transit so rapidly that the space allotted to the C., V. & C. line, as I understood it, would not be overcrowded. When the steamboats failed to carry off the cotton as rapidly as I had expected I — out a good deal of cotton by all rail route, which would have otherwise been sent by the river route, for the express purpose of relieving the pressure on the space allotted to the C., V. & C. line.

As stated in my answer to the last interrogatory 54, I never gave Jones Bros. & Co., or any other shipper, and rebate or cut rate of freight. The river-and-rail rate, when the C., V. & C. line
2295 covered the cotton by insurance to protect it while in transit by boat from Memphis to Cairo, was precisely the same as the all-rail route, both rates being fixed by the traffic association. Two cents per one hundred pounds of this through rate was allowed for the expense of insuring cotton sent by river and rail route while in transit from Memphis to Cairo. Some of the shippers, particularly Jones Bros. & Co., claimed that their eastern insurance, taken out by the owners of the cotton for whom they were acting as agents in purchasing and shipping the cotton, covered the cotton while in transit by river from Memphis to Cairo, and that therefore it was unnecessary to doubly insure that cotton while en route from Memphis to Cairo. They therefore agreed to assume the insurance from Memphis to Cairo on the part of themselves as shippers and the owners and consignees of the cotton. Upon their accepting the bills of lading with this stipulation inserted in the bills, by which

they assumed on the part of themselves, the owners, and consignees of the cotton the fire and marine risk from Memphis to Cairo, I charged them exactly the tariff rate, deducting the two cents per one hundred pounds allowed by the division of the through rate made by the traffic association for insurance from Memphis to Cairo. In all these cases the bills of lading were issued at the net rate—that is, at the full all-rail rate less two cents per one hundred pounds allowed for insurance between Memphis and Cairo. This was no secret cut, nor was it a rebate, nor was it a cut rate. I did not, and do not, understand that Jones Bros. & Co. realized a single penny of this for themselves. They simply saved to the owners of the cotton this two cents per one hundred pounds which would otherwise have been paid for double insurance on the cotton between
2296 Memphis and Cairo. This two cents allowed for insurance out of the through rate cut no figure at all in the agreed boat rate from Memphis to Cairo. The agreed boat rate was six cents per one hundred pounds. That was the amount allowed to the boats in the division made between the different carrier lines in making up the general tariff through rate. I had no part whatever in making up this general tariff through rate. It was made, as before stated, by what I understood to be the Central Traffic Association, composed of the general freight agents of the various transportation lines. The reasons alleged in this interrogatory for not moving the cotton more rapidly are not in accordance with the facts as I understand them. The only reason given to me by the officers of the steamboat lines was that the continued low stage of water and scarcity of help rendered it impossible for them to more rapidly transport the cotton. I never entered into any arrangement or scheme whatever with Jones Bros. & Co. or any other shippers to enable them to get cotton received into the compress company's sheds and buildings on permits issued by other transportation agents. A few days before the fire, I think only a day or two, I was informed either by some officer or employé of the compress company, or by some transportation agent, that Jones Bros. & Co. had put some cotton into the compress company's sheds on the permits of the agent of another transportation line, and afterwards procured from me bills of lading covering that same cotton, and that the compress company insisted that the agent upon whose permit the cotton was received should route the cotton out. As soon as I received this information I immediately changed
2297 the routing of about a thousand bales of cotton, which I supposed covered the cotton with regard to which the complaint was made, and directed it to be shipped by all rail, changing from river route to the C., O. & S. W. rail route to Cairo, either via Reeves or Fulton, and so made out my shipping orders and procured the O K and signature of W. R. McIntosh, general agent of that line, on the back of the compress company's receipts for said cotton. These receipts, so endorsed by McIntosh, I deposited with the dray tickets covering the same cotton in the office of the compress company the day before the fire. When I left them in the office of the compress company the clerk was too busy to then

check them over, but said to me, "Leave them here and I will check them up in the morning and sign them." That night the fire occurred, and in the morning, instead of giving me the receipts endorsed by McIntosh and duly signed by the Merchants' Cotton Press & Storage Company, the clerk returned me the dray tickets and the unsigned receipts endorsed by W. R. McIntosh. I have those receipts so endorsed by McIntosh in my possession, and I here present them and make them a part of this answer, marked Exhibits 4 and 5. If any order was ever issued to the employees in charge of press No. 4 of the Merchants' Cotton Press & Storage Company not to receive any more cotton intended for transportation by river I was not informed of any such order.

On or about the 12th of November, in the evening, there was a meeting of the various shippers and agents of the various transportation lines to consider what could be done to hasten the shipping of cotton so as to relieve the pressure upon the compress sheds, the cotton then coming into market very rapidly, while the trans-
2298 portation, on account of low water and scarcity of cars, was too slow to keep pace with the increased inflow of cotton. I attended that meeting as the agent of the C., V. & C. line, and fully explained the situation in so far as the C., V. & C. line was concerned. I stated what had been stated to me by the officers of the steamboat lines, namely, that the long-continued low water and the scarcity of help had prevented them from transporting the cotton as rapidly as they had expected, but that they hoped very soon in the future to be able to take large quantities of the cotton. I do not think that any officer or employee of the Merchants' Cotton Press & Storage Company attended that meeting or made any complaint. If there —, I heard no complaint made. After I had made my statement, and after other shippers had made their statements, it was mutually agreed that we had all been doing all we could and no complaint or fault was found with the C., V. & C. line in my hearing; but by reason of the facts I ascertained that night with regard to the amount of cotton then in the compress I refused to make any new engagements for the transportation of cotton from and after that night. I took no new contracts. I issued bills of lading after that night on cotton that I had before contracted to transport, but I made no new engagements after that night.

I never was in any way a party to any contrivance, purpose, or scheme to detain and delay cotton in the compress. My interest and my purpose at all times was to ship cotton as rapidly as I could possibly get it transported. I was informed that it was quite common for cotton to remain in the compress sheds sometimes as long as six weeks. I did my utmost to ship cotton so rapidly as to have all the time a part of the space allotted to the C., V. & C. Line, as I understood it, empty or nearly so, so as to enable me to make
2299 new engagements for the receiving and shipping of cotton.

I do not know exactly, but I do not believe that any of the cotton covered by the C., V. & C. Line bills of lading destroyed by the fire of November 17th, 1887, had been in the compress sheds one full month, and a very large proportion of the cotton covered

by the C., V. & C. Line bills of lading destroyed by the fire had not been in the compress exceeding two weeks or three weeks. Neither Jones Bros. & Co. nor any other shippers ever asked me or in any way intimated to me their desire to have me become a party to any transactions or schemes by means of which they could get cotton into the compress. Jones Bros. & Co. very rarely asked me to issue a permit. I think fully nine-tenths of all their cotton covered by the C. V. & C. Line bills of lading was received by the compress company directly from them and dray tickets issued to them without any permit ever having been asked for from me or given by me."

X Int. Please state fully the terms of any freight arrangement between you and the firm of Jones Bros. & Co. for the transportation of cotton by the C., V. & C. line that was after such arrangement delivered by said —*form* the said press No. 4. State whether the true rate of freight to be paid by Jones Bros. & Co. or by their consignees appeared on the face of the bills of lading, and whether any portion of the freight money as stipulated for on the face of the bills of lading was to be rebated or refunded to Jones Bros. & Co. or their consignees.

Ans. I never made any secret or different arrangement or agreement with Jones Bros. & Co. for the transportation of cotton. My engagements and contracts with Jones Bros. & Co. for the transportation of cotton were precisely the same as arrangements made with other shippers. I neither made any cut rate nor promized any rebate to Jones Bros. & Co. on any cotton to be transported by me for them. Whenever they or any other shipper desired to assume for themselves and the owners and consignees of the cotton the fire and marine risk from Memphis to Cairo I subtracted from the through rate the two cents allowed by the division of the through rate for insurance between Memphis and Cairo. If they had not assumed expressly the fire and marine risk between Memphis and Cairo and accepted from me bills of lading clearly showing such assumption I should have charged them, in addition to the rates mentioned in the bills of lading, two cents per one hundred pounds additional,which would have made the through rate by river and rail the same as the through rate by rail routes. The full face of the bills of lading was to be paid. There was no arrangement whatever to abate or rebate one penny of the amount of freight mentioned in the bills of lading. The exact, true rate of freight to be paid by Jones Bros. & Co. or by their consignees appeared on the face of the bill of lading issued by me and delivered to Jones Bros. & Co. I have fully explained this whole matter in my answers to direct interrogatories 54 and 55.

2300

X Int. Was the true and actual rate of freight to be paid by Jones Bros. & Co. for the transportation of said cotton, taking into consideration any rebate of the same to be made by the carrier, the same as was being then charged by the all-rail routes from Memphis to Eastern points?

Ans. As I have just stated in my answer to the last interrogatory, there was no rebate whatever granted to Jones Bros. & Co. or

to any shipper. Taking into consideration the two cents per one hundred pounds allowed for insurance between Memphis
2301 and Cairo upon the express assumption by the shippers for themselves, the owners, and consignees of the cotton that they would assume the marine and fire risk between Memphis and Cairo and relieve the C., V & C. line from any liability therefor made the through rate by river to Cairo and thence East by rail precisely the same as was being then charged by all-rail routes from Memphis to Eastern points."

Also the following questions to and answers of L. L. Fellows: Int. 68 and anrwer, Int. 70 and answer, Int. 71 and answer, Int. 95 and answer, Int. 96 and answer, and also receipts 28, 36, 38, 41, filed as exhibits to the deposition of said Fellows, of date respectively Oct. 25th, Oct. 31st, Nov. 4th, and Nov. 14th, signed by S. J. King.

28. The opinion of Mr. Snodgrass, judge of the supreme court of the State of Tennessee. (Record, page 2146.)

29. The decree of that court. (Record, page 2160.)

30. All the necessary papers on the writs of error to the Supreme Court of the United States. Record, page 2190 *et seq.*

JOHN M. BUTLER,
WILLIAM H. CARROLL,
For Defendants.

T. B. TURLEY,
S. P. WALKER,
For Plaintiffs in Error.

2302 [Endorsed:] Case No. 15,133, &c. Supreme Court U S. October term, 1893. Term No., 807 to 813, incl. The Merchants' Cotton Press & Storage Co., P. E., *vs.* The Ins. Co. of North America *et al* Stipulation as to parts of record to be printed. Filed Nov. 22, 1893.

Endorsed on cover: Tennessee supreme court. Case No. 15,133; term No., 807: The Merchants' Cotton Press & Storage Company, plaintiff in error, *vs.* The Insurance Company of North America of Philadelphia & *al.* Case No. 15,134; term No., 808: The National Fire Insurance Company of Connecticut, plaintiff in error, *vs.* The Insurance Company of North America of Philadelphia & *al.* Case No. 15,135; term No., 809: The Mutual Fire Insurance Company of New York, plaintiff in error, *vs.* The Insurance Company of North America of Philadelphia & *al.* Case No. 15,136; term No., 810: The Continental Insurance Company of New York, plaintiff in error, *vs.* The Insurance Company of North America of Philadelphia & *al.* Case No. 15,137; term No., 811: The Fire Association of New York, plaintiff in error, *vs.* The Insurance Company of North America of Philadelphia *et al.* Case No. 15,138; term No., 812: The Liverpool & London & Globe Insurance Company of England, plaintiff in error, *vs.* The Insurance Company of North America of Philadelphia *et al.* Case No. 15,139; term No., 813: The Royal Insurance Company of England, plaintiff in error, *vs.* The Insurance Company of North America of Philadelphia *et al.* Filed September 15, 1892.

Office Supreme Court U. S.
FILED.
JAN 9 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1893.

Nos. 807 813.

THE MERCHANTS COTTON PRESS AND STORAGE COMPANY, AND OTHERS, PLAINTIFFS IN ERROR,

vs.

THE INSURANCE COMPANY OF NORTH AMERICA OF PHILADELPHIA, AND OTHERS.

BRIEF FOR DEFENDANTS IN ERROR

ON MOTION TO DISMISS OR AFFIRM.

TURLEY & WRIGHT,
METCALF & WALKER,
Solicitors.

S. C. TOOF & CO., PRS. & LITHS., MEMPHIS.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1893.

THE MERCHANTS COTTON PRESS & STORAGE COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

THE INSURANCE COMPANY OF NORTH AMERICA, OF PHILADELPHIA, ET AL., DEFENDANTS IN ERROR.

Brief in Behalf of Plaintiffs in Error.

STATEMENT OF CASE.

On the 17th of November, 1887, one of the compresses in the city of Memphis, known as the West Navy Yard Compress, was destroyed by fire. It contained at the time about 14,000 bales of cotton, of the value of about $700,000, and said cotton was totally consumed in said fire.

About 10,000 bales of the cotton was covered by bills of lading of the various railroad companies having terminals at Memphis; and substantially all of the cotton thus covered by bills of lading was insured under marine policies held by the consignees thereof.

The Merchants Cotton Press & Storage Company, the owner of the press, was under written contract with certain of the carriers to protect the liability of the carriers by insurance. It, the said compress company, at the time of said fire, held $301,750 of fire insurance. The form of the fire policies

appears at page 206 of the transcript. The loss of this $700,000 in value of cotton gave rise to litigation commencing soon after said fire, of which the case now to be submitted is the last remnant.

Soon after said loss the various owners of the cotton thus burned filed their bills in the chancery court of Shelby county, Tennessee, against the compress company, the fire companies in which it held policies, and, in cases in which the cottons were covered by bills of lading, against the carriers issuing the bills of lading. Twenty-one bills were thus filed. The first of these cases tried was that of the Lancaster Mills, which was heard on appeal by the Supreme Court of Tennessee at the April term, 1890, and disposed of under an opinion reported in 5 Pickle 1.

After the delivery of that opinion, the remaining cases were brought to a final hearing in the chancery court during the then following winter, all being heard together and disposed of under one decree, and an appeal having been prosecuted to the Supreme Court of the State, were there disposed of under one opinion and one decree—the case being *Deming v. M. C. P. & S. Co.*, 6 Pickle 306.

All of said cottons covered by bills lading were insured, by the owner, under so-called marine policies, except those of Coates & Co. and Hooper & Buffington (amounting to 150 bales). Said marine companies have paid all of said losses to their respective assured; and it was held, in the cases *supra*, that all such suits, whether nominally so or not, were in fact prosecuted for the use and benefit of said marine companies; that under the principles of the Lancaster Mills case, an owner having full insurance of his own, could not recover against the compress company damages for the breach of its obligation to carry insurance; that that proposition did not apply to a case in which the carrier liability should be established, the marine

company in such case being entitled to be subrogated to the rights of the owner against the carrier, and the carrier, if in contractual relations with the compress company, being entitled to recover on the contract between it and the compress company for the breach of the obligation of the latter to carry full insurance; that the $301,750 of fire insurance held by the compress company should be applied, primarily, to the indemnity of the carriers held liable, and holding contracts for full insurance with the compress company, and to owners otherwise uninsured—this application of the fire insurance fund being made in virtue of the equities of the compress company, as well as of such carriers and uninsured owners; that under this equitable mode of applying or appropriating the fire insurance fund, the said fund would be sufficient to pay 85 55-100 per cent. of the liability of carriers held liable, and losses of uninsured owners—the Cairo, Vincennes & Chicago Line being declared liable for the purpose of that computation; that the rights of the owners, or the marine companies suing in the right of the owners, were against the carriers, judgment being rendered against such carriers as were before the court and held liable on the bills of lading; and that such carriers thus subjected to judgment, and holding contracts with the compress company for full insurance, were entitled to judgment over against the compress company for 14.45 per cent. of their liabilities, respectively, and to a recovery of their respective pro rata interests in the fire insurance fund—the same amounting to 85 55-100 per cent. of their respective liabilities.

The bills of lading of the C. V. & C. Line covered 5087 bales of the cotton burned. At the time those bills of lading were issued, the line was in the hands of receivers, appointed by the Federal Court for the Southern District of Illinois, sitting at Springfield, Ill. Neither that line nor its receivers were before the court in the litigation thus far referred to, in con-

sequence of which the bills, so far as concerned those cottons, were dismissed without prejudice.

After the results thus reached in the Lancaster Mills case and the Deming case, to-wit, on the 7th day of August, 1891, this bill was filed.

The plaintiffs herein are three marine companies whose assured held bills of lading of the C. V. & C. Line, and who have been paid their losses by the complainants. The defendants to the bill are the compress company, the various fire companies (they being specifically named), the C. V. & C. Line and its receivers, Thomas and Tracy, and all other marine companies (they being specifically named), who paid losses growing out of said fire.

The theory of the bill is that the C. V. & C. Line and its receivers were liable to the holders of its bills of lading for the value of the cottons burned and covered by those bills of lading; that the marine companies, which had insured the cottons and paid the losses, were entitled to be subrogated to the rights of the owners as against the carrier; that the C. V. & C. Line is entitled to recover over against the compress company and the fire companies, and that the plaintiffs are entitled to reach the compress company and the fire companies, either directly or through the rights of the C. V. & C. Line.

Under the decree of the State Supreme Court in the Deming case it was ordered that $210,224.37 of the fire insurance fund be reserved for the indemnity of the C. V. & C. Line, if that line should be sued, and its liability, and right to said insurance fund established in such proceeding.

This bill is filed by the plaintiffs in their own behalf and in behalf of all the marine insurance companies, whether plaintiffs or defendants, standing in a like situation—that is, in behalf of the marine companies who have paid losses to the holders of the bills of lading of the C. V. & C. Line.

The marine companies standing in the same situation with the plaintiffs were made defendants to the bill—notably the Phœnix Insurance Company of New York, whose policies were held by R. H. Deming & Co., and covered 3609 bales of cotton, of the value of $179,108.41, and which had paid the losses to said Deming & Co. On the 7th day of August, 1891 (the same day the bill was filed), the Delaware Mutual Safety Insurance Company and Thomas and Tracy, receivers, for the use of the Delaware Mutual Safety Insurance Company, filed an answer and cross-bill, averring in substance that said insurance company had issued its policy on 500 bales, consigned to the Tremont & Suffolk Mills; that it had paid the loss and that it was in the same situation with the original plaintiffs and entitled to like relief.

On the 24th of September, 1891, Thomas and Tracy, receivers, filed their answer and cross-bill in which, in substance, they deny liability to the plaintiffs under the bills of lading of that line, claiming exemption from liability by virtue of the fire clauses therein, and by way of cross-relief against the compress company and the fire companies claimed a recovery over against the former by virtue of the contract of date May 24, 1887 (which contract is set forth *in hæc verba* in the original bill), and against the latter under the policies issued by them—this cross-relief being claimed by said receivers in the alternative—that is, in the event they should be held liable to the plaintiffs.

The Phœnix Insurance Company, of New York, the Atlantic Mutual Insurance Company, the Providence Washington Insurance Company, the British Foreign Insurance Company, and the Marine Insurance Company, all of which companies had paid losses to the holders of the bills of lading of the C. V. & C. Line, and stood in the same situation therefore with the plaintiffs, filed their claims in the form of cross-bills, on

the theory of the bill, and claiming the same relief as was set up and claimed in the original bill.

On the 5th of September, 1891, certain of the fire insurance companies, viz., the Royal Insurance Company, the Continental Insurance Company, the Home Insurance Company of Louisiana, the Liverpool, London & Globe Insurance Company, the National Fire Insurance Company, and the Fire Association, filed their petition to remove the case to the circuit court of the United States for the District of West Tennessee. Trans. 94.

On the 22d of September, 1891, a pleading was filed, entitled "Amended Bill and Amended Cross-Bills," in which it was averred that the statement of the original bill, to the effect that the C. V. & C. Line was a corporation, and Thomas and Tracy, receivers thereof, was a mistake; that in fact they were the receivers of the Cairo Division of the St. Louis, Wabash & Pacific Railroad Company; that the last named company was a corporation formed by the consolidation of several corporations (among them the Cairo & Vincennes Railroad Company), and existing under the laws of Missouri, Illinois, Indiana, and Ohio; and that said Thomas and Tracy had been appointed receivers by the Federal Court at Springfield, Ill., in a suit to foreclose a mortgage upon said division, and were operating the same under the traffic name "C. V. & C. Line."

On the 5th of October, 1891, that being the first day of the term, the petition for removal, with bond in due form, was presented to the court with a prayer for the usual order of removal. The court approved the bond, but took the question of entering the order recognizing the removal and staying proceedings under advisement. Trans. 93.

On the 21st of November, 1891, by leave of court, an amended petition for removal was filed. Trans. 96–98.

On the 18th of December, 1891, the court, after argument on the petition for removal, declined to order the same, and directed that the cause proceed, regardless of that petition. The petitioners duly excepted to that order, and were "allowed to put their exceptions and objections of record as a standing exception and objection to each and every further step that may be taken herein, without the necessity of repeating the same as each such step may be taken." Trans. 104.

On the 31st of December, 1891, and the 12th of January, 1892, the compress company and certain of the fire companies who had been served with process (the same that had filed the petition for removal) filed their separate answers.

From time to time other marine insurance companies who had paid losses upon cottons destroyed by said fire, but who did not hold bills of lading of the C. V. & C. Line, filed their claims in the form of answers and cross-bills, denying the liability of the C. V. & C. Line, and claiming that the fire companies were liable to contribute with them to the losses so paid by them.

The whole case being at issue and proof taken, was brought to final hearing in the State chancery court, and after argument a decree was pronounced by the chancellor, adjudging in substance as follows:

1st. That the receivers of the C. V. & C. Line were liable on the bills of lading issued by that line; and judgment was accordingly rendered in favor of each of the marine companies who had paid the losses of their assured—the latter holding bills of lading of said line—for the value of the cottons covered by such bills of lading.

2d. In favor of the C. V. & C. Line against the compress company for the 14.45 per cent. of its liability, under the principles of the decree entered in the Deming case.

3d. In favor of said line and against said compress company for the pro rata interest of said line in $76,750 of fire insurance—the theory of the decree on this point being (1) that it was the duty of the compress company to sue on said policies; (2) that by virtue of the contract limitation of one year in the fire policies, the companies which had not been sued were discharged from liability, and (3) that the fire companies to the amount aforesaid had been discharged by failure to sue within the year or otherwise preserve their liability, by the default of the compress company.

4th. In favor of said line and against the compress company for $4394.12, the interest of the C. V. & C. Line in the amount adjudged in the Deming case to have been overpaid by the compress company to uninsured owners, from the fire insurance fund.

5th. That the C. V. & C. Line was entitled to recover the full unpaid balance of the fire policies, and judgment was accordingly rendered in its favor against the fire companies before the court.

Trans. 154–164.

From the decree thus rendered, the compress company prayed and consummated an appeal, and the fire companies sued out writs of error.

At the April term, 1892, the cause was heard in the Supreme Court of the State, and the decree of the court below was affirmed. The right of removal was denied, and the contention of the defendants—plaintiffs in error here—that the contracts with the C. V. & C. Line were illegal and could afford no foundation for recovery, was overruled.

The Merchants Cotton Press & Storage Company and the several fire companies bring the case to this court by writs of error.

Of course the case is here upon the Federal questions only. Two errors are assigned:

First: That the Supreme Court of Tennessee erred in so much of its decree as refused to order or recognize the removal of the case to the United States Circuit Court for West Tennessee, under the petition for removal filed by these plaintiffs in error.

Second: That the Supreme Court of Tennessee erred in allowing a recovery on the bills of lading issued by the C. V. & C. Line to Jones Bros. & Co.—the proof showing that L. L. Fellows, the agent of said line, had made a special and secret rate or rebate to said Jones Bros. & Co., in violation of the law known as the Interstate Commerce Law.

The case is now brought before the court under sub-section 5 of rule 6, allowing the defendant in error to couple with a motion to dismiss the writ of error a motion to affirm "on the ground that although the record may show that this court has jurisdiction, it is manifest the writ or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument."

BRIEF.

I

The motion to affirm should not be entertained for the reason that though it is nominally coupled with a motion to dismiss, such motion to dismiss is colorable only, and manifestly made for the purpose of bringing on the motion to affirm.

Whitney v. Cook, 99 U. S. 607.

The record shows that the question upon which the jurisdiction depends is not frivolous, and that the appeal was not taken for delay.

II

The record presented a case for removal to the Federal Court, under the act of Congress in that regard. It showed a separable controversy between citizens of different States, which could be determined without the presence of any of the other parties to the record.

Knapp v. R R. Co., 20 Wall. 117.
Barney v. Latham, 103 U. S. 205.
Hyde v. Ruble, 104 U. S. 407.
Hart v. Kernochan, 103 U. S. 562.
Knouse v. Martin, 15 How. 198.
The Removal Cases, 100 U. S. 457.
Ayres v. Chicago, 101 U. S. 184.
Shainwald v. Lewis, 108 U. S. 158.
Ayres v. Wiswald, 112 U. S. 187.
Ayres v. Watson, 113 U. S. 594.
Crump v. Thurber, 115 U. S. 56.
Ins. Co. of North America v. Delaware Mut. Ins. Co., 50 Fed. Rep. 243.

III

The record establishing that the contracts of affreightment between the C. V. & C. Line and Jones Bros. & Co. were made in violation of the Interstate Commerce Law—such violation making the whole contract illegal under the terms of the statute—no recovery should have been allowed on the bills of lading issued by the C. V. & C. Line to Jones Bros. & Co.; and the case of the complainant marine companies depending upon the establishment of the liability of the carriers must therefore fail so far as concerns those bills of lading.

27 Am. & Engl. Corp. Cases 8.

Pretal Guano Co. v. Jarnette, 25 Fed. Rep. 675.

Dent v. Ferguson, 132 U. S. 50.

Hanna v. Eve, 3 Cranch 242.

Gibbs v. B. Gas Co., 130 U. S. 393.

Miller v. Ammon, 145 U. S. 421.

St. L. R. R. Co. v. T. R. R. Co., 145 U. S. 393.

ARGUMENT IN SUPPORT OF BRIEF.

I

The first point suggested in the brief *supra*, viz., that the record does afford even colorable ground for the motion to dismiss, we are content to leave to the determination of the court, after it shall have examined the merits of the two Federal questions upon which errors are assigned.

We do, however, suggest that this court will scarcely hold that a removal question is too frivolous to stand for argument, when the U. S. Circuit Judge has, in an elaborate opinion, sustained the right of removal, and the sufficiency of the petition under which it was sought to be accomplished.

II

The petition for removal depends wholly upon the question of separable controversy between citizens of different States, or between a citizen of a State and an alien.

On the principle, well settled by the decisions of this court, that the parties to the controversy will, in determining a question of removal, on the ground of separable controversy, be arranged according to their real rights or claims, and not merely as they happen to stand on the record, it is evident that in one aspect of the case, *the real plaintiffs* are the marine companies, both complainants and defendants, who have paid the losses of their assured, who held the bills of lading of the C. V. & C. Line; and in another aspect, the C. V. & C. Line itself.

The defendants are:

1st. The C. V. & C. Line—the plaintiffs alleging that it is liable on its bills of lading, and that they (aside from all ques-

tions as to the liability of the compress company, or the fire companies in which it held policies) are entitled to judgments against it.

2d. The compress company—the plaintiffs alleging that under its contract with the C. V. & C. Line, it is liable to that line for the deficit of fire insurance, and that the plaintiffs are entitled, directly, or through the C. V. & C. Line, to enforce that liability. The same liability on the part of the compress company is asserted by the cross-bill filed by the C. V. & C. Line.

3d. The fire companies in which the compress company held policies—these companies being also made defendants to the cross-bill filed by the C. V. & C. Line.

These fire companies file the petition for removal.

As to them the plaintiffs assert, (1) that the C. V. & C. Line is liable, and (2) that in consequence of that liability, the fire companies are liable for the full unexhausted balance of their policies, viz., for the sum of $210,224.37 reserved under the decree of the Supreme Court of the State in the Deming case, and that the plaintiffs are entitled to compel payment of the full unpaid balance of the fire policies, and to appropriate the fund when collected to discharge the liability of the C. V. & C. Line.

The compress company is the assured in all the fire policies. By each fire policy, the insurance company did "insure the Merchants Cotton Press and Storage Company"—the risk taken being "on all cotton in bales received by them as agents for the benefit of railroads, transportation lines, or owners. * * * * The liability of the insurer is to begin on the receipt of said cotton on the premises of the assured, as herein

described, for compressing, and is to cease and terminate when removed from the platforms of the M. C. P. & S. Co. for transportation."

Transcript 206.

If a recovery against the fire companies therefore can be had at all, it is certain that the judgment must be *in the name or right of the compress company* as trustee, for the use of whomsoever may be adjudged to be the beneficiaries.

The right of removal depends solely on the question of *separable controversy*—the act of 1888 providing that any party may remove the case if there be, as to that party, a controversy between him and a citizen or citizens of another State, or other States, which can be wholly determined as between them without the presence of the other parties to the record. We put our right of removal in the first instance, upon the ground that the case is virtually *a suit by the compress company against the fire companies*—the compress company being a citizen of Tennessee, and each of said fire companies being a citizen of another State, or an alien.

The fact that the compress company is a defendant *on the record* makes no difference; for it remains true, that this is *a suit on the fire policies* by the holder of the legal title, viz., the compress company, for the use of the alleged beneficiaries. It differs only from a simple suit at law on the policies, brought by the compress company (the assured) for the use of whomsoever might be entitled, in the fact that here the alleged beneficiaries sue in equity, making the compress company, as trustee and holder of the legal title to the fire policies, a defendant, and also making the fire companies defendants. In respect of the latter, the sole question is, are they liable and shall judgment be rendered on the policies? There are but two parties to that question—the compress company on the one side, and the fire companies on the other.

Judge Hammond held that he must look at the case as the plaintiffs chose to frame it; that thus looking at it, he found no controversy between the compress company and the fire companies, the bill charging that there was confederation and collusion between them, and charging the compress company with a breach of trust for its failure to pursue the fire companies.

But we submit that although it be true that the compress company has not on the record made any controversy with the fire companies, it is also true that the plaintiffs and cross-plaintiffs have made a controversy with them, *in the name and right of the compress company*, making that company a defendant—the facts found by Judge Hammond as showing the non-existence of a controversy between the compress company and its fire insurance companies really showing only grounds upon which the alleged beneficiaries could rightfully come into a court of equity, making the holder of the legal title, the compress company, a defendant. The case is in substance a suit on the policies, in the name of the compress company, as much as if the bill had been filed in its name for the use of the plaintiffs and cross-plaintiffs, as their respective interests might be adjudged. The proposition asserted in the brief of adversary counsel that the compress company and fire companies "are not shown to have any adverse interest, but a common interest," is not tenable. Taking the bill to be true for the purposes of the petition, how does the allegation that the compress company and the fire companies are in alliance, making common cause against the marine companies, affect the proposition, that plaintiffs' whole case is predicated upon the theory (1) that the carrier was liable to the assured of the plaintiffs, and is liable to the plaintiffs upon the principles of subrogation; (2) that the compress company held fire insurance for the indemnity of the carrier, and that

the fire companies, as between them and the marine companies, are primarily liable; and (3) that the plaintiffs, or the C. V. & C. Line—the latter claiming the same right by a cross-bill—are entitled to appropriate the fire insurance to the payment of the carrier liability? So that, whether the bill be looked at as a suit between the marine and fire companies to settle the question of primary and secondary liability as between them—the plaintiffs' claim of secondary liability being dependent upon establishing the liability of the carrier; or, as a suit in which the plaintiffs' whole right is to recover judgment against the carrier, leaving the carrier to work out its rights against the compress company and the fire companies, it remains unquestionably true that there is no "common interest" between the fire companies and the compress company. Their respective liabilities are wholly distinct and independent; and, bringing the matter down to the very point upon which the right of removal depends, it is also true that upon the theory of the bill the recovery upon the fire policies would be by the carrier, in the name of the compress company, just as was done by the decree of the Supreme Court of Tennessee in the Deming case; and there is, therefore, a controversy between the compress company and the fire companies, *although the controversy is inaugurated by and for the use of the plaintiffs, or by and for the use of the carrier, under its cross-bill.*

The case of *Graham v. R. R. Co.*, 3 Wall. p. 712, cited by defendants in error, holding that the court will not, without pleadings, decree as between defendants, has no bearing on this point. By the bill the original plaintiffs themselves make the question, and seek to appropriate the alleged liability of the fire companies. Would the case be in the least different if, as suggested by Judge Hammond, the compress company had filed a cross-bill against the fire companies?

Would any controversy other than was already made by the pleadings have been presented by such cross-bill? Would not such a cross-bill have been dismissed as being wholly unnecessary?

We submit that it is beyond peradventure true, upon the principles of the decision by the Supreme Court of Tennessee in the Deming case (and this whole case is rested on that decision) that the point to be determined is of the liability of the fire companies *to the compress company*, for the use of the plaintiff marine companies, or of the C. V. & C. Line, and that upon the principles of that decision, it is equally true that there is no "liability in common" between the compress company and the fire companies—the former, upon the theory of the liability of the carrier, being liable for 14½ and the latter for 85½ per cent. of the loss.

The fact that the compress company by its attitude on the record is made to sue *as trustee*, makes no difference. It is settled that on a question of removal *the citizenship of the trustee governs*. Here the compress company, the trustee, is a citizen of one State, Tennessee, and the fire companies are citizens of other States, or aliens. If any one of them is a citizen of another State, that is sufficient to remove *the whole case* under the act of 1888.

But if the right of removal is to depend upon the citizenship of the *usee or cestui que trust*, the right would still exist for the reason that upon the theory of the bill the C. V. & C. Line is the sole beneficiary of the fire insurance fund yet remaining undistributed. The bill is predicated upon the decision of the Supreme Court of Tennessee at last term in the Deming case, averring the liability of the C. V. & C. Line and the right of that line to indemnity out of the fire insurance fund to the extent of eighty-five and a half (85½) per cent. of its liability as provisionally declared in the Deming case.

The receivers of the C. V. & C. Line are citizens of New York, and some of the defendant fire companies are citizens of other States.

The third alternative proposition—that adopted by Judge Hammond—is that the suit must be regarded as a suit by each marine company against each fire company for a recovery on the proportional liability of the fire company to it—that the bringing together of all the suits into one, as is here done, may be upheld, for purposes of convenience, but that the case presents a clearly divisible, separable controversy between each marine company on the one side, and each fire company on the other, which may be determined without the presence of any other party.

This is a creditor's bill to recover on the fire policies in the name of the assured, to-wit, the compress company, as trustee, for whomsoever may be entitled, the court being called upon in this proceeding to determine the questions: (1) of the liability of the fire companies, and, (2), which of the claimants are entitled to the proceeds of this fire insurance, and in what proportions. With the latter question the fire companies evidently have no concern. So far as concerns the first of the questions above stated, it can be determined in a simple suit at law by the compress company against the fire companies. The case then clearly presents a separable controversy between those parties, removable into the Federal Court.

The proposition made by the defendants in error, that a garnishee cannot remove the case, is not applicable. The case presented is not one of a liability of the compress company to the plaintiffs, and of a mere indebtedness of the fire companies to the compress company sought to be reached by garnishment; neither is it an indebtedness of the

C. V. & C. Line to the plaintiffs, and an indebtedness of the fire companies to the C. V. & C. Line, sought to be reached by garnishment. The indebtedness of the fire companies on their policies, if adjudged at all, is to the compress company, the assured therein, *as trustee*, and could not be reached by the general creditors of the compress company. Again, these plaintiffs, to the extent of the existence of the fire insurance fund, *are not creditors of the compress company*, for, to exactly that extent, they have no claim against the compress company, as has already been determined in the Deming suit. Their claim against the compress company is only to the extent that it failed to carry insurance for the indemnity of the carriers; and certainly the liability of the fire companies, if adjudged, could not be applied to that liability. Looked at as an effort to recover judgment against the C. V. & C. Line, and to get satisfaction of that judgment by garnishment of the fire companies, we answer that the fire companies are not indebted to the C. V. & C. Line; they are indebted, if at all, to the compress company, as trustee, and the ultimate answer to this whole proposition is the one already stated, to-wit: that the bill is a creditors' bill seeking to recover from the fire companies in the name of the compress company, as trustee, for the benefit of whomsoever may be entitled.

The fire companies are formally and regularly made defendants to the bill, though the plaintiffs have seen fit to issue and serve upon them writs of garnishment *in a form never seen before*—requiring them to answer "what, if anything, they owe upon their policy or policies, applicable to the liability of the C. V. & C. Line, if liability shall be declared herein, or by any court with the parties requisite to the validity of the judgment before such court." By the prayer of the bill they are, in the usual form, required to answer it. They are, at

the most that can be contended for by plaintiffs, parties in a dual capacity. If they answered as garnishees, and were discharged, they would remain before the court on their answer to the bill for the settlement of every question raised by the record. If the liability of the C. V. & C. Line should not be established, or if its right to the fire insurance fund should not be decreed, *then other questions at once arise between the two sets of insurers*—all such other questions being expressly reserved by the decree in the Deming case, and the fire companies, of course, being before the court for all such purposes. In no proper or fair sense are they before the court simply as garnishees.

A general creditor of the C. V. & C. Line could not by garnishment appropriate the amount due from the fire companies on their respective policies. Why? Because, (1) as already stated, the fire companies, if indebted at all, are indebted to the compress company, and the right of the carrier to the fruits of the fire policies must be worked out in a court of equity, through that company; and (2) if the fire policies constitute general assets of the carrier, upon or in which the owners of this cotton have no special claim, lien, or trust, they must belong to the receivers, and must be administered as general assets in the case in which the receivers were appointed; and (3) upon the theory of the bill itself, the marine companies are entitled, upon establishing carrier liability, to have the fire companies adjudged primarily liable. As between the two sets of insurers—the marine companies insuring the owners and the fire companies insuring the compress company and carrier—the question is the same in principle as was involved in the leading case of *North British Co. v. L. L. & G. Ins. Co.*, 5 Ch. Div. (L. R.) 569.

It would seem hardly to be necessary to argue that such a question could not be raised and settled on a mere garnishment of the fire companies.

The fire companies cannot be held liable as general debtors of the carrier, under writs of garnishment, unless they owe the carrier *in any and every event*, as an ordinary debtor owes his creditor; but confessedly here they do not so owe, but do owe the compress company, as trustee of the carrier, only upon and after the adjudication of carrier liability for this particular loss; and even in the latter event the C. V. & C. line must share with other creditors in a like category, and having an equal claim upon the fire insurance held by the compress company.

In support of the positions assumed in the foregoing presentation of the questions involved we refer to the following cases:

In *Barney v. Latham*, Sup. Court U. S., the State of Minnesota received from the United States lands to aid it in the construction of railroads. The benefit of this grant as to certain lands was transferred by the State to the Wynona & St. Peters R. R. Co. N. C. Barney and others had, under a contract between them and the Wynona & St. Peters R. R. Co., constructed 105 miles of its road, whereby the said railroad company became entitled to several hundred thousand acres of land granted by Congress to the State.

The said railroad company agreed, in consideration of its indebtedness to the said N. C. Barney and others, to sell and convey to them such lands as it should receive from the State by reason of the construction of said 105 miles of road. Sales of much of this land were made, the proceeds going into the hands of the individual defendants to the suit. Afterward, certain of the contractors with the railroad who were entitled to an interest in the lands, having died, the surviving contractors organized a corporation, known as the Wynona & St. Peters Land Co. and had the remaining lands conveyed to that corporation.

The bill was filed by the heirs and representatives of the deceased contractors to make the individual defendants who had received the proceeds of sale before the organization of the corporation account for the plaintiff's share of said proceeds and also to compel the Wynona & St. Peters Land Co. to account to the plaintiffs for their interest in the lands conveyed to it. Part of the complainants were citizens of Minnesota and the defendant corporation was also a citizen of Minnesota. A petition to remove was filed by the individual defendants, who were citizens of New York, Wisconsin and Massachusetts. Upon this petition the question arose whether the controversy between the complainants and the individual defendants was a severable controversy from that between the complainants and the defendant corporation, the Wynona & St. Peters Land Co. The court held that it was, and that the Wynona & St. Peters Land Co. was not a necessary party to an action to settle said controversy between complainants and the individual defendants. It held further, that it might be proper under the State practice to combine both controversies in one suit and that the Wynona & St. Peters Land Co. might be a proper party to such suit, but the court drew the well-known distinction between proper parties and indispensable parties, and holding that the Wynona & St. Peters Land Co. was not an indispensable party to the controversy between the complainants and individual defendants, it sustained the removal and took jurisdiction of the whole case.

103 U. S. 205 to 216.

So, in the case at bar, the controversy is really between the compress company, the trustee, and the defendant insurance companies. It is simply a question as to whether each one of said companies is bound for the whole or any part of its policy.

All other questions are severable from this one, and this one can be settled without the presence of any of the other parties to the litigation.

In *Hyde v. Ruble*, this court reiterates the doctrine that, to entitle a party to removal upon the grounds sought in the case at bar, there must exist in the suit a separate and distinct cause of action, in respect of which all the necessary parties on one side are citizens of different States from those on the other.

104 U. S. 407–8.

The determination of the question before the court does not depend upon the manner in which the pleader has arranged the parties on the record. The court itself will see what question is involved, and then for itself arrange the adverse parties on each side of that question; and, if all on one side of the real controversy reside in different States from those on the other, then it is a case for removal.

Shainwald v. Lewis, 108 U. S. 158.

In *Harter v. Kernochan*, 103 U. S. 562, the court lays down the rule that it may disregard the particular position of complainants or defendants, assigned to the parties by the draughtsman of the bill; and it rules further that the right of removal is not defeated because there is a party to the suit residing in the same State with the party who seeks the removal, provided he is not an essential or necessary party.

Where the title to the property is vested in a trustee, the citizenship of the trustee controls upon the question of removal.

Knapp v. R. R. Co., 20 Wall. 117 to 120.

The right of removal depends upon the state of facts at the time the petition is filed, and cannot be defeated by amendment made afterward.

Kanouse v. Martin, 15 How. 198.

Harter v. Kernochan, 103 U. S. 562.

As to the jurisdiction of the Circuit Court of the United States over the case at bar:

So far as the defendant insurance companies are concerned, having agents within this district, they could have been sued in the United States Circuit Court originally. But no matter how this is, the case can be removed to the United States Court.

The right to object to being sued in any other district than that of which he is an inhabitant, is personal to the defendant and may be waived.

Amsick v. Balderstone, 44 Fed. Rep. 641.
Purcell v. British Land & Mortgage Co.,42 Fed.Rep.465.
Burck v. Taylor, 39 Fed. Rep. 581.
Jones v. Andrews, 10 Wall. 327.

"For the purposes of a removal, the matter in dispute may be ascertained, and according to the facts the parties to the suit arranged on opposite sides of that dispute." And if all the parties thus arranged are citizens of different States from those on the other, the right of removal exists.

The Removal Cases, 100 U. S. p. 457.
Ayres v. Chicago, 101 U. S. p. 184.

Any *one* defendant, having a separable controversy with a citizen of another State, may remove.

Barney v. Latham, 103 U. S. p. 205.

The question is not whether there are other *proper* parties, but other *indispensable* parties. In other words, can the suit against the fire companies be determined solely as between them on the one side of the controversy, and the compress company, the assured in the policies, or the receivers, or the marine companies respectively, on the other.

Barney v. Latham, 103 U. S. p. 205.
Hyde v. Ruble, 104 U. S. p. 407.
Ayres v. Wiswall, 112 U. S. p. 187.
Ayres v. Watson, 113 U. S. p. 594.
Crump v. Thurber, 115 U. S. p. 56.

If, as we primarily insist, the case is virtually a suit between the compress company on one side, and the petitioning fire companies on the other, there can be no fair doubt of the diverse citizenship necessary to sustain the removal jurisdiction. Neither can there, in that view of the case, be any fair doubt of the jurisdiction in respect of the amount involved, the least of the policies sued upon exceeding, without interest, the sum of $2000.

If the case be regarded as a suit by the marine companies (claiming by subrogation the rights of the original consignees, whom they have paid) against the carrier, the C. V. & C. Line, and by that carrier (as the beneficiary of the policies held by the compress company), against the fire companies, there can be equally no fair doubt of the diverse citizenship necessary to support the removal. The C. V. & C. Line according to the averments of the original bill, and of the petition for removal, was and is a citizen of the State of Illinois; and according to the averments of the amended bill, and amended cross-bills, it was and is a consolidated company existing under the laws of Missouri, Illinois, Indiana and Ohio. It may be regarded as a citizen of either one of these States, and still the necessary diverse citizenship would exist—the petitioners being, some of them, citizens of other States, and some of them aliens, and citizens of Great Britain.

The cross-bill of Thomas and Tracy was filed September 24, 1891, before the return day of the subpœna to answer, and before the presentation to the court of the petition for removal.

Trans. 73–74.

If, taking still another alternative view of the case, the suit be regarded as a suit by each marine company directly against each fire company for the *pro rata* interest of such marine company in the policy of such fire company, the necessary

diversity of citizenship, and the necessary amount in controversy, still appears upon the record sufficiently to maintain the removal right. That was the view upon which Judge Hammond sustained the removal.

The suggestion is that the opinion of Judge Hammond overruling the motion to remand is based upon the divisibility of the case into so many separate suits between the marine companies, respectively, and the fire companies; and it is said, treating the case on this theory, that neither of the plaintiff marine companies sues either one of the fire companies for a sum amounting to $2000, exclusive of interest and costs. This is doubtless true, if the suit of each of the three *original* plaintiffs be treated as a separate suit against each of the fire companies, but it is not true generally, or for the purposes asserted by the plaintiffs, for the bill is filed by the plaintiffs *in behalf of themselves and all other marine companies standing in like situation*, among those others being the Phœnix Insurance Company of New York. *That company filed its cross-bill against the fire companies before the petition for removal was filed.* Trans. 43.

The policies of the Phœnix Company covered 3609 bales of cotton of the value of $179,108.41 (Transcript 52 and 77); the whole number of bales sued for being 5087, of the value of $245,733.46.

The fire companies petitioning for removal, and the amounts of the policy or policies issued by each, are as follows:

The Royal Insurance Co. of England, . . .	$35,000
The Continental Insurance Co. of New York, .	15,000
The Fire Association of New York, ...	10,000
The Home Insurance Co. of Louisiana, . . .	10,000
The Liverpool, London & Globe of England, .	35,000
The National Fire Insurance Co. of Connecticut,	5,000

Each of the fire companies has already paid or been adjudged to pay within a small fraction of 32 per cent. of its policy. There is therefore left unexhausted of the policy issued by the National Fire Insurance Co. of Connecticut (and that is the smallest of the list) $3400; and it will readily appear by the figures above stated that the interest of the Phœnix Insurance Company alone in that policy will exceed $2000.

The citizenship of every corporation party to the case, whether complainant or defendant, sufficiently appears in the original and amended bill, and cross-bills. Whilst the said bills do not use the word "citizen," yet, every corporation, complainant and defendant, is stated to be a corporation "by the law of" such and such State. For example: the first defendant named, to-wit, the Delaware Mutual Safety Insurance Company is named as "a corporation by the laws of Pennsylvania;" and so entirely through the list of complainants and defendants the bill gives the State or government by which each corporation was created.

Trans. pp. 1, 2, and 3.

A corporation is conclusively presumed to be composed of citizens of the State or nation which chartered it, or from which it derives its powers.

L. C. R. R. Co. v. Letzon, 2 How. 497.

If one of the parties is a corporation, the record must show the State by or under the laws of which it was created, and its members will then be conclusively presumed to be citizens of that State.

Muller v. Dows, 94 U. S. 444.

Steamship Co. v. Tugman, 106 U. S. 118.

The necessary diverse citizenship need not appear by the petition if it otherwise appear by the record.

Steamship Co. v. Tugman, *supra*.

Bondurant v. Watson, 103 U. S. 281.

Another reply to the proposition that the amount involved is insufficient, may be found in the suggestion that under the act of 1888, the petition, if sufficient in other respect to effect a removal will remove *the whole case* to the Federal Court; and the whole amount being far in excess of $2000 that objection to the jurisdiction cannot be maintained.

Besides, there is nothing in the second section of the act conferring and regulating the right of removal, requiring that the amount involved *in the separable controversy* shall exceed $2000.

The citizenship of the respective parties, as shown by the petition for removal (Transcript pp. 96 and 97) and the original and amended bills and cross-bills (Transcript pp. 1, 2, and 69) is as follows:

The compress company is a citizen of the State of Tennessee; the Royal Insurance Company, and the Liverpool, London & Globe Insurance Co. are aliens, citizens of Great Britain; the Continental Insurance Company, and the Fire Association are citizens of the State of New York; the Home Insurance Company is a citizen of the State of Louisiana; the National Fire Insurance Company is a citizen of the State of Connecticut; the C. V. & C. Line is a citizen of the State of Illinois, or the State of Missouri, or Indiana, or Ohio; the receivers Thomas and Tracy, are citizens of the State of New York; the Phœnix Insurance Company is a citizen of the State of New York; the three original complainants are citizens of the States of Pennsylvania, New York and Rhode Island, respectively; the other parties have their citizenship shown on pages 1, 2, and 3, of the transcript.

The question of the right to remove the case as presenting a controversy between an alien, and a citizen of the United States, is sufficiently dealt with in the opinion of Judge Ham-

mond, delivered on the motion to remand this case to the State court, reported in 50 Fed. Rep. 243.

If the court shall find it necessary to decide that question we submit what he there says in support of the right of removal.

The claim of the defendants in error, that the bill was dismissed as to the Home Insurance Company, is unsupported by the record. So far as there is any support for such claim it will be found simply in the fact that by the amended bill and cross-bill, filed on the 22nd of September, 1891, (Transcript p. 73) the plaintiffs declared a dismissal in the body of the bill as to said insurance company. No further action in that regard was ever taken, and we submit that the bill was never dismissed as to said company.

The Supreme Court of Tennessee denied the right of removal upon the ground that the fire insurance companies, though made defendants to the bill as formal parties, and required to answer as such, occupied substantially the position of garnishees, and were named as defendants only that their indebtedness on account of insurance obligations might be reached and held subject to such final decree as complainants might obtain against the C. V. & C. Line—that the case could not be treated as presenting virtually a suit by the compress company against the fire companies, and, that the Merchants Cotton Press & Storage Company, having failed as trustee to sue for, collect, and appropriate to the proper parties the insurance effected by it for them, the marine insurers had the right to join it as defendant, make all the fire companies defendants, and have the exact liability of each fixed and adjudged in complainaint's favor. The court said:

"It may be true that complainants, after obtaining a decree against the C. V. & C. Line, might have sued each of the fire

insurance companies separately, for its proportion of the insurance to which, by virtue of such recovery, complainants might have been authorized to subject it; but the same is true in respect to appropriation of indebtedness of garnishees, and yet it does not follow that for the same reason such debtors may not all be proceeded against at the same time, and with a view to hold such indebtedness to satisfy a prospective recovery under the general principles of equity, and under our statute (M. & V. Code, sec. 4200), nor change the fact that the litigation is but incidental to the main controversy."

"If the complainants failed in that, no controversy remains, and no question for settlement between any parties to the suit. The marine insurers had no right of action against any of these fire companies, except as incidental to its litigation with this carrier. These fire companies, in the language of *Railroad Company v. Wilson*, 114 U. S. 60–62, are made parties, only in aid of the principal relief which is asked 'and no relief whatever can be granted' unless a judgment is obtained against the carrier, and, as to that controversy, the carrier is an indispensable party. 'The sole purpose of the suit' is to obtain the judgment and secure its collection. 'The suit is therefore against both on a single cause of action.'

"This case is peculiarly one in which all the fire companies, with the defaulting trustee, the M. C. P. & S. Company should have been joined. There was no separate insurance on particular cotton, or in favor of a particular owner or carrier."

"The liability of each defendant is the object of an equitable account, and the recovery of each complainant depends upon it. Each insurer is in equity indebted to each carrier in some amount, and the M. C. P. & S. Company for the remainder, as decreed by the chancellor." Trans. 174–175.

In answer to this ruling we submit:

First. That it is a mere perversion of the terms to say that the fire insurance companies were defendants upon this record as garnishees merely. The leading controversy presented by the record arose out of the fact that there were two sets of insurers; one set, to-wit, the marine companies issuing poli-

cies to the owners, and the other set, to-wit, the fire companies, issuing policies to the compress company as the agent of the carrier and covering carrier liability. The question therefore was the same as that presented in the great case of *North British Co. v. L. L. & G. Ins. Co.*, 5 Ch. Div. (L. R.) 569.

The leading point made by the bill was, and necessarily was, that the marine insurers, issuing policies covering the owners' interest, were secondary in liability to the fire companies issuing policies indemnifying the carrier against liability; and, as already stated, we submit it is a mere misuse and perversion of terms to say that in such case the fire insurance companies were before the court incidentally only, and as mere garnishees. The bill was in truth one brought to settle conflicting rights to a trust fund, to-wit, the fire insurance held by the compress company, confessedly as trustee; and the two questions presented were, (1) as to the primary liability of the fire insurance companies (that question being dependent upon establishing the carrier liability); and, (2) to whom that insurance fund belonged.

Second. It is not true that if the complainants had failed to establish carrier liability no other question remained for settlement. In the event of such failure the policies issued by the fire companies would have still covered the owners' interest, as was expressly decided in the Lancaster Mills and Deming cases. The case would have thereupon resolved itself into one of concurrent insurance upon the same interest; and every policy, marine and fire, would in that event have been subject to a *pro rata* or contributory liability—each company being liable in the proportion of its policy to the whole insurance upon owners' interest.

To meet that very contingency, all of the marine insurance companies who had paid their assured, respectively, for the

losses of said cotton, *whether such cottons were covered by bills of lading of the C. V. & C. Line or not*, were made defendants—the draftsman of the bill unquestionably intending, in the event of failure to establish the liability of the C. V. & C. Line, to treat the case as one of contributory insurance, and to claim for the plaintiff and cross-plaintiff marine insurance companies, who had paid the losses, contribution from the fire companies.

In the brief of adversary counsel, at page 7, we find this paragraph:

"The several marine companies that had granted policies of insurance on cotton destroyed in the said fire, and for the loss of which the carrier was not liable, are brought before the court to assert any claim which they might have to share in this insurance fund, and because each of them claimed an interest in the fund, held in trust by the Merchants Cotton Press & Storage Company *for contribution, in the event the C. V. & C. Line should be decreed not liable.*"

Third. The alleged collusion and confederacy between the Merchants Cotton Press & Storage Company, and the fire companies, might, (though we deny that it did) properly affect the question of liability on the part of the compress company; but there is not the least shadow of foundation for the proposition that *it could in any manner affect the question of the liability of the fire insurance companies.* The case, therefore, should have been determined, so far as the right of removal by the fire companies of a separable controversy was concerned, *exactly as if that averment had not been in the bill.*

In reply to some of the points of the brief in behalf of defendants in error upon the question of removal, we submit:

First. The fact that the petition was not verified by oath, is answered by the considerations (1) that no such point was made in the State court, but the petition was disposed of on its

merits; (2) that every fact averred in the petition as a ground of removal can be found in the original and cross-bills. Certainly the petitioner need not swear to the truth of matters already put into the record by the adversary party.

Second. It is submitted in the brief of adversary counsel that the averment in the petition for removal, that each of the petitioning companies is a citizen of a named State, is insufficient—citing *Lafayette Insurance Co. v. French*, 18 How. 405. That suggestion we answer by again turning to the original, amended, and cross-bills in, and by which it appears that each of the corporations, parties to the suit, complainants and defendants, is a corporation by the laws of a named State, or named foreign country.

Third. The suggestion, supported by a citation of *Jackson v. Ashton*, 10 Peters, to the effect that the caption of the bill cannot be looked to as an averment by the bill of citizenship, is not maintainable.

Jones v. Andrews, 10 Wall. 327.

Express Co. v. Kuntz Bros., 8 Wall. 342.

In the former case it was said that "all that is necessary is, that it fairly appear by the bill of what place the respective parties are citizens;" and a caption, identical in its material aspects to that of this bill, was held sufficient to show the diverse citizenship.

Here we have not only the citizenship of the parties stated with great particularity in the caption of the bill, but in its body (Trans. 5–6) we find an exact statement of the residence of each—the caption and body, taken together, giving the State by which the corporation was created, and the city of its residence, within that State; and, at the conclusion of the bill (Trans. 13), we find a prayer for process against the resident, and for publication against the non-resident defendants.

A corporation cannot be a resident of a State other than that which created it. It cannot change its domicile.

In the latter case there was an averment in the declaration to the effect that plaintiffs were a firm of natural persons associated in the banking business in Omaha, and that had been, for a period of eighteen months, engaged in that business at that place, was equivalent to saying that they had their domicile there, and was a sufficient averment of citizenship.

And notwithstanding the court, through Mr. Justice Curtis, in the 18th Howard case, *supra*, had said that an averment that a company was a citizen of a particular State could have no sensible meaning attached to it, the court in the last mentioned case said that an averment to the effect that the defendant to the suit was a foreign corporation, formed under and created by the laws of the State of New York, carried the obvious meaning that the defendant was a citizen of the State of New York. (p. 351).

III

The right of the plaintiff marine companies herein, suing by subrogation to the rights of consignees, necessarily goes back to the rights of the consignors. In other words, the consignee can recover only to the extent that the consignor could have recovered.

Neither consignors nor consignees could have recovered on these contracts of affreightment, for the reason, that in the making thereof Jones and Fellows were engaged in an unlawful violation of the Interstate Commerce Law. That law forbids and *declares unlawful* all "special rates, rebates, drawbacks and preferences."

Secs. 2 and 3, p. 52, Sup. to Rev. Stat. of U. S.
Sec. 6, as amended by act of March 2, 1889,
pp. 684 and 685, Sup. *supra*.

It is true that Fellows distinctly denies the fact upon which this proposition is founded; but it is also true that that fact is with great certainty and upon statements distinctly shown to be made by him from his books, testified to by Walter Jones, the shipper, in whose right the shippers, in the main, sue. Trans. 214–216.

He testified that he was allowed a rebate of from 2 cents per hundred pounds on some lots up to 3½ cents on others; that these rebates sometimes appeared on the bills of lading, in other instances were paid to him in cash by Fellows; and to emphasize his testimony he produced a tabulated statement of all the lots of cotton shipped by him and burned in the press, containing, opposite each lot, a statement of the amount of rebate allowed on each, made up from his books. Trans. p. 208. He testifies, in so many words, that Fellows was giving him a "cut rate"—meaning, of course, that he gave him a rate less than the regular, established rate. Trans. p. 215. So that, notwithstanding the criticism of adverse counsel upon their client and witness, Jones, we submit that his testimony is unquestionably true.

The plaintiffs rely on the testimony of Fellows as overthrowing that of Jones. Fellows says that he at no time allowed more than 2 cents per 100 pounds reduction; and that that was not a special rate to Jones, but was a regular reduction, authorized by the Central Traffic Association, in consideration of the assumption by the shipper of the fire and marine risk on river cottons from Memphis to Cairo; but this statement is completely met by the facts, (1), that in many instances he allowed as high as 3½ cents rebate; and, (2), in three instances he allowed 2 cents, and in one instance 3 cents rebate on "*all rail*" cotton. (Tabulated Statement 208.)

Jones says that he sometimes received as much as $1 per bale rebate; that in contracting for the shipment of large lots

he sometimes made as much in rebates as his whole commission amounted to (Trans. 216); and at other points in his testimony he states the whole matter in such detail as to show that he cannot be mistaken about it. The documents filed in this case conclusively corroborate him and contradict Fellows. Of the first three bills of lading filed, two of them are to Fall River, Mass., one at 52½ and the other at 53½ cents (Trans. exhibits following page 14). Another bill of lading for a lot marked EMIN has "all rail" written on the face of it, and shows a rate of 53½ cents—the same as Fellows' cut rate by river and rail (see 4th exhibit following p. 14 of Trans). Three all rail bills of lading show a rebate of 2 cents, and one of 3 cents per hundred. Record pp. 205–208. The circular letter of Fink, Vice-President of the Central Traffic Association, shows the river rate from Memphis to Cairo at 10 cents (Trans. p. 207); and completely negatives Fellows' right to reduce it to 6 cents, as shown by Storm's testimony (Trans. p. 211). That the regular rate to Boston was 55½ cents is abundantly proven, and that the rate was a "special" one to Jones is shown by the fact that Jones was thereby enabled to sell cotton at 1-16 of a cent lower than others.

In a case arising under an Illinois statute, similar to the interstate commerce law, it was held that an agreement between shipper and carrier, where a rebate was promised, was illegal and void, and that the shipper could not recover upon carrier liability.

27 Am. & Eng. Corp. Cases, p. 8.

By sec. 4347, R. S., Congress forbade the transportation of goods in foreign vessels from one to another port of the United States, and imposed a forfeiture of the cargo as a penalty. A cargo having been carried in a ship of foreign registration, from one to another port of the United States, the carrier sued

for the freight money. It was held that the right of action being founded upon a violation of law, no recovery would be allowed.

Petral Guano Co v. Jarnette, 25 Fed. Rep., p. 675.

Other and striking instances of the refusal of the courts to allow a party to an unlawful contract to recover thereon may be found in *Radich v Hutchins*, 95 U. S., p. 210; *Kennett v. Chambers*, 14 Howard, p. 38; *P. S. Co. v. A. R. R. Co.*, 24 Howard, p. 247; *Dent v. Ferguson*, 132 U. S., p. 50; *Hanna v. Eve*, 3 Cranch 242.

In the case of *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, the court held that a broker procuring the execution of an unlawful contract, and being himself in the attitude of a *particeps criminis*, could not recover for the services thus rendered. The court said: "The distinction between *malum in se* and *malum prohibitum* has long since been exploded; and, as 'there can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal'—*Bank of United States v. Owens*, 2 Pet. 527–539,—it is clear that contracts in direct violation of statutes expressly forbidding their execution, cannot be enforced."

Perhaps the most striking recent instance of a refusal of this court to allow a recovery upon an illegal contract, will be found in the case of *Miller v. Ammon*, 145 U. S. 421.

In that case the court held that the plaintiff could not recover on an account for liquors sold to defendant, it appearing by the proof that the plaintiff had not complied with the license ordinance of the city of Chicago in respect of that business—the court saying: "The general rule of law is that a contract made in violation of a statute is void; and that, when the plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover."

That the courts will refuse their aid, to either of the parties, to an unlawful contract, is obvious, and universally held, as matter of public policy. The exception is only in cases where public policy is best subserved by permitting a recovery, not for the sake of the wrongdoer, but in the public interest.

2 Pomeroy's Eq. sec. 940.

Of course we could multiply these citations indefinitely. We have given only those that appear to us to be striking instances of the enforcement of the doctrine.

It is claimed among other things by plaintiffs, in answer to this suggestion, that the Interstate Commerce Law does not apply, for the reason that the testimony disproves any "common control" over the river and rail route.

In response to this suggestion, we submit that the question of common control does not arise, because by these bills of lading the C. V. & C. Line made itself the carrier from Memphis to the point of destination. This point must be claimed by plaintiffs' counsel, for they must establish that the receivers were common carriers, by contract, as well within as without the territory traversed by the railroad which they were controlling. The C. V. & C. Line not only made itself, by contract, an interstate carrier for the entire route, but its own proper line was an interstate line.

Its designation of the Anchor Line as the river carrier, contained in its shipping directions to the compress company, was not contained in its bills of lading. By the latter it simply undertook to carry, giving itself the privilege to carry by river to Cairo, and having the right to adopt any river carrier that it saw fit to employ.

In short, it was itself a through carrier, simply employing such steamboats as it saw fit, as sub-carriers.

The cargo from Cairo to destination was an interstate cargo, all rail, and as to that portion of the route, the question of common control over river and rail route, supposed to be negatived by the testimony of Storm, does not arise. But it has no place upon the record in any view of the subject, the C. V. & C. Line being a through carrier from Memphis to destination by the terms of its bills of lading.

The Supreme Court of Tennessee put its decision on this point on the ground that, to refuse a recovery here, would rather encourage than discourage agreements for unlawful rebates—saying: "We are of opinion, however, and rest our decision upon the ground, that if it was assumed that the law was applicable, and the fact of agreement for rebate and special rate proved, it could not prove (avoid) liability on the part of the carrier for freight received, and covered by insurance in the hands of the carrier's agent.

"The law makes such agreement as to rebates, etc., void, but it does not make the contract of affreightment otherwise void, and we think there is nothing in the law, or policy of it, which requires a construction that would excuse a carrier from all liability when it made such a contract in connection with that for receipt and transportation of freight.

"Such a construction would encourage, rather than discourage, such unlawful operations (agreements) for rebates."

Trans. 175.

In reply, we submit—

First. The agreement for the special or reduced rate, whether it be called a rebate or what not, is not a contract in any sense, incidental or collateral, to the main contract of affreightment. It is the contract of affreightment itself, and is made unlawful by the interstate commerce law.

Second. The suggestion that the denial of recovery would encourage future breaches of the law, seems, to say the least of it, a novel one. The opposite would seem unquestionably to be the truth; for certainly to deny the shipper relief upon the carrier liability would discourage shippers from making such contracts.

The suggestion of the opinion on this point would apply with equal force to every case of unlawful contract, and would reverse the entire attitude of the courts on that question.

Third. The court at another point of the opinion on this question said: "Such a contract as to rebates would be void, and of course the agreed freight rate in violation of law could not be enforced, but we think the shipper could, nevertheless, recover for loss of his freight *through the carrier's negligence*, and, incidentally, of the fire companies."

This suggestion of liability through "the carrier's negligence" has not the shadow of foundation in the record. On the contrary, at the time of the decision of that case, the plaintiffs had abandoned all efforts to show negligence against the carriers, based on the alleged negligence of their agent, the compress company, although in the preceding cases of the Lancaster Mills and Coates & Co. that had been one of the great points of struggle between the parties, and had been definitely settled by the verdicts of two juries, in favor of the compress company and the carriers. It is therefore surprising to find the Supreme Court of the State suggesting liability of the carrier on the ground of negligence. It was, upon the record, liable on the bill of lading contract of affreightment, as a common carrier, if liable at all; and *that is the very contract which we charge to have been made illegally, and in violation of the interstate commerce law.*

We reply briefly to some of the points of adversary counsel on this question:

On page 44, it is said that according to our contention, the title to the cotton *would be forfeited* by the illegality of the contract of affreightment. And yet the same brief, at page 41, quotes from our assignment of errors thus: "That the receivers were at most bailees of the cotton in question, and that recoveries could be had against them only in the relation of bailees, the right of such recovery being negatived by the record, as decided by the Supreme Court"—an accurate statement of our position.

Second. On pages 54 and 55, it is claimed that the receivers may recover regardless of the question of carrier liability, upon the principles settled in the case of *Home Insurance Co. v. Baltimore Warehouse Co.*, 93 U. S. 143; and yet, at page 20 of the same brief, it is said: "The open question was the liability of the C. V. & C. Line for the losses of cotton covered by its bills of lading. Collateral to that, *and dependent upon it*, were the liabilities of the storage company and the fire insurers."

It is unquestionably true that the carrier might, by policies in apt terms, have insured every interest in the property, and whether liable or not, might have recovered the whole value thereof—the recovery inuring to the benefit of the owners so far as the carrier should not be interested. But, upon that view of the case, the marine companies instead of being entitled to recover over against the carrier and its fire companies (on the principles of *North British Co. v. L. L. & G. Ins. Co.*, 5 Ch. Div. (L. R.) 569) would be entitled only to contribution from the fire companies, all insurance being of the

same interest, and all to be marshalled, to settle the proportional liability of each insurer.

Cal. Ins. Co. v. Union Compress Co., 132 U. S. 423.

It is the carrier liability—as has been thoroughly settled by the Supreme Court of Tennessee, in the cases growing out of this fire, and already cited—that establishes the secondary liability of the marine, and the primary liability of the fire companies. Strike out the element of carrier liability and the whole case assumes a new aspect, viz: of concurrent insurance, and ratable liability among all the insurers.

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S. P. Walker
For plaintiffs in error.

JAN
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

Nos. 807–813.

THE MERCHANTS' COTTON PRESS AND STORAGE CO. ET AL., PLAINTIFFS IN ERROR,

vs.

THE INSURANCE CO. OF NORTH AMERICA ET AL., DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

JOHN M. BUTLER,
HOLMES CUMMINS,
WILLIAM H. CARROLL,
Attorneys.

IN ERROR TO THE

SUPREME COURT OF THE STATE OF TENNESSEE.

NO. 807.

THE MERCHANTS' COTTON PRESS & STORAGE COMPANY, PLAINTIFF IN ERROR,

vs.

THE INSURANCE COMPANY OF NORTH AMERICA ET AL.

NO. 808.

THE NATIONAL FIRE INSURANCE COMPANY OF CONNECTICUT, PLAINTIFF IN ERROR,

vs.

THE INSURANCE COMPANY OF NORTH AMERICA ET AL.

NO. 809.

THE MUTUAL FIRE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

THE INSURANCE COMPANY OF NORTH AMERICA ET AL.

NO. 810.

THE CONTINENTAL INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR,

vs.

THE INSURANCE COMPANY OF NORTH AMERICA ET AL.

NO. 811.

THE FIRE ASSOCIATION OF NEW YORK, PLAINTIFF IN ERROR,

vs.

THE INSURANCE COMPANY OF NORTH AMERICA ET AL.

NO. 812.

THE LONDON, LIVERPOOL & GLOBE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

THE INSURANCE COMPANY OF NORTH AMERICA ET AL.

NO. 813.

THE ROYAL INSURANCE COMPANY OF ENGLAND, PLAINTIFF IN ERROR,

vs.

THE INSURANCE COMPANY OF NORTH AMERICA ET AL.

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MOTION TO DISMISS OR AFFIRM.

A motion to dismiss each of the several writs of error to the judgment of the Supreme Court of the State of Tennessee, taken in the above suits by the plaintiffs in error, is made on behalf of the defendants in error, to which is added a motion to affirm.

The motion in each case is as follows: —

Come now the defendants in error, Anthony J. Thomas and Charles E. Tracy, receivers of the Cairo division of the Wabash, St. Louis & Pacific Railway, by their counsel, John M. Butler, appearing in that behalf; and the defendants in error, the Insurance Company of North America (of Philadelphia), the Atlantic Mutual Insurance Company, the Providence Washington Insurance Company, the Phenix Insurance Company, the Delaware Insurance Company, and the China Mutual Insurance Company, by their counsel, William H. Carroll, appearing in that behalf; and the Newport News & Mississippi Valley Company by their counsel, Holmes Cummins, appearing in that behalf, and move the Court to dismiss the writ of error in the above-entitled cause, for want of jurisdiction, because the judgment or decree from which the said writ of error purports to have been taken is the judgment or decree of the Supreme Court of one of the United States, to wit, the Supreme Court of the State of Tennessee; and because there is no Federal question involved in the controversy, as shown by the record to give this court jurisdiction for review of the decision of the Supreme Court of the State of Tennessee, and the decision of the Supreme Court of the State of Tennessee is final.

And the said defendants in error, by their counsel as aforesaid, also move the Court to affirm the said judgment or decree from which the said writ of error purports to have been taken, because, although the record in this cause may show that this Court has jurisdiction in the premises, it is manifest that the said writ of error was taken for delay only.

(Signed) JOHN M. BUTLER,
WILLIAM H. CARROLL,
HOLMES CUMMINS,

Attorneys for the above Defendants in Error for the purposes of this motion.

STATEMENT OF THE CASE.

On the seventh day of August, 1891, the Insurance Company of North America, of Pennsylvania, the Atlantic Mutual Insurance Company, of New York, the Providence Washington Insurance Company, of Rhode Island, on their own behalf, and on behalf of all other Marine Insurance Companies that might be entitled to share with them in the funds mentioned and described, filed their bill of complaint in the Chancery Court of Shelby County, Tennessee, against the Delaware Mutual Insurance Company, of Pennsylvania, the Marine Insurance Company, Limited, of London, a resident of the United Kingdom of Great Britain and Ireland, the Phenix Insurance Company, of New York, the British & Foreign Insurance Company, Limited, of Liverpool, England, and R. H. Deming and J. H. Foster, residents of Rhode Island, the C. V. & C. Line, of Illinois, Anthony J. Thomas and Charles E. Tracy, as receivers thereof, citizens of New York, the Merchants' Cotton Press and Storage Company, a corporation, of Tennessee, S. R. Montgomery, Napoleon Hill and Thos. H. Allen, Jr., as trustees, citizens of Tennessee, forty-four fire insurance companies, of West Virginia, Pennsylvania, New York, Illinois, Louisiana, Wisconsin, Alabama, Connecticut, Ohio, Texas, Indiana, and of the United Kingdom of Great Britain and Ireland, six other alien marine companies, and William Watson and E. R. Wood, aliens.

The domiciles of the different corporations appeared only in the caption of the bill when the petition for removal was filed, and not elsewhere in the record, and not in the petition itself.

Their object was primarily to establish three several claims against the C. V. & C. Line and its receivers, upon three bills of lading issued by that line to Jones Bros. & Co. at Memphis, Tenn., and covering 150 bales of cotton marked "MADE," 50 bales marked "DOXO," and 100 bales marked "HORN," all of which were, on the seventeenth day of November, 1887, destroyed by fire at Memphis, Tenn., in Compress No. 4, with that press and about 14,000 bales of cotton.

And their object, incidentally, was to apply to the several re-

coveries the following choses in action: the proportionate share of an insurance fund in possession of the Merchants' Cotton Press and Storage Company, held in trust by that company for the C. V. & C. Line and its receivers; the several amounts alleged to be due by the Merchants' Cotton Press and Storage Company to the receivers for breach of the contract of the 24th of May, 1887, by which the Merchants' Cotton Press and Storage Company stipulated it would take out, for the benefit of the receivers, in good and solvent companies, insurance to cover any loss of cotton delivered it by the receivers, while under its control and until delivered to them; and the several sums due from each of the forty-four defendant fire insurance companies, which the Supreme Court of Tennessee, in the Lancaster Mills Case and in the Consolidated Compress cases, 90 Tenn. 456, had adjudged that it was the duty of the Compress Company to collect and hold in trust for the C. V. & C. Line; and, to subject the interest of the receivers, in the Senatobia street property, which the Merchants' Cotton Press and Storage Company, subsequent to the fire, conveyed to the defendants Napoleon Hill, S. R. Montgomery and Thos. H. Allen, Jr., as trustees, to secure to the persons in contractual relations with that company payment of the contingent liability of the company to them, by reason of the failure of the company to fully insure the cotton, for which the carriers were liable, in Compress No. 4.

The claims propounded by the complainants were as follows: that of the Insurance Company of North America, the right of action of the Shove Mills, its assured, the consignee of the 150 bales of cotton marked "MADE"; that of the Atlantic Insurance Company, the right of action of the Fall River Manufacturing Company, its assured, for the loss of fifty bales of cotton, marked "DOXO" and that of the Providence Washington Insurance Company, the right of action of its assured, the Tecumseh Mills, for the loss of 100 bales of cotton marked "HORN."

The derivative character of the claim of the Delaware Insurance Company was averred to be the right of action of the Tremont and Suffolk Mills, growing out of the payment for the loss of 500 bales of cotton; the claims of Phenix Insurance Company were the several rights of action of R. H. Deming and J. H. Foster (partners

under the firm name of R. H. Deming & Co.), growing out of its payment to them of the loss of sundry lots of cotton, aggregating 2,804 bales and the right of action of the Hill Manufacturing Company, growing out of the payment to R. H. Deming & Co., the assignees of that company, the loss of 500 bales; the right of action of the Totocket Mills through payment to R. H. Deming & Co., its assignees, the value of 100 bales; the right of action of the King Philip Mills through the payment to R. H. Deming & Co., the value of 105 bales; the right of action of the Troy Cotton and Woolen Manufacturing Company through the payment to R. H. Deming & Co., its assignees, the value of 100 bales; that of the British and Foreign Insurance Company (if any), through the payment to John Collins & Co. and one Robinson, the value of lots of cotton to which its policies were applicable; and that of the Marine Insurance Company of London, Limited, through the payment of the value of a large lot of cotton to its assured, the Warren Manufacturing Company — all destroyed in the Compress fire, and covered under several bills of lading of the C. V. & C. Line.

That these choses in action and the interest of the receivers in the Senatobia street property might be reached, the complainants sued out writs of attachment under the following provisions of the Tennessee Code: —

"Any person may also sue out an attachment in the Chancery Court upon debts or demands of a purely legal nature, except causes of action founded on torts, without first having recoverd a judgment in law, whenever the amount in controversy is sufficient to give the court jurisdiction.

"When any non-resident, having choses in action or other property in this State, is indebted to another non-resident who is himself indebted to any person, resident or non-resident, such person, without first having recovered a judgment at law, may file a bill in equity to have such choses in action or other property attached, making said non-resident debtors and the person in possession of such choses in action, or other property, defendants to said bill."

The several amounts unpaid by the defendant fire insurance companies and due upon the theory of the liability of the receivers for the loss of cotton are not stated in the bill, but the date and amount of each policy to the Merchants' Cotton Press and Storage Company

are given; and it is also set forth that they are "on all cotton in bales received by them as agents for the benefit of railroads, transportation lines and owners in the boundaries of the Merchants' Cotton Press and Storage Company's West Navy Yard Compress. The liabilities of the insurer is to begin on the receipt of said cotton on the premises of the assured, as herein described, for compression, and is to cease and terminate when moved from the platforms of the Merchants' Cotton Press and Storage Company for transportation." The demands against the Merchants' Cotton Press and Storage Company are stated for the proportionate share of the fire insurance fund it had collected in trust for the C. V. & C. Line and for its breaches of contract in failing to effect full insurance of the cotton destroyed and for its failure to take out insurance in good and solvent companies.

The several marine companies that had granted policies of insurance on cotton destroyed in the said fire, and for the loss of which the carrier was not liable, are brought before the court to assert any claim which they might have to share in this insurance fund, and because each of them claimed an interest in the fund held in trust by the Merchants' Cotton Press and Storage Company for contribution, in the event the C. V. & C. Line should be decreed not liable.

It is alleged in the bill that there will be no fund for contribution, and facts and circumstances tending to show insurance of separate and distinct interests by the fire companies and these marine companies are set forth.

The prayer of the bill is: —

"To the end that the questions arising upon the matters and things herein set forth may be determined between the parties, and the rights of all the parties may be determined, the plaintiffs file this bill in their own right and in right of all other marine insurers who may stand in their position with respect to the liability of the carrier, the said C. V. & C. Line; and on their own behalf and in behalf of such insurers who choose to come in and become parties hereto, they pray for copy and subpœna to issue to the resident defendants, requiring them and each of them to appear and answer the allegations of this bill; that the defendant insurance companies doing business in this State be served with process, by service under the

statute upon their respective agents; that attachment issue and be levied upon the interest of the C. V. & C. Line in the trust fund held by the Merchants' Cotton Press and Storage Company, and by garnishing the defendant fire insurance companies to answer and state what, if anything, they owe upon their respective policies applicable to the liability of the C. V. & C. Line, if liability shall be declared herein, or by any court with the parties requisite to the validity of the judgment before such court.

"And for all such defendants as may be non-resident, who have no agents here, upon whom service can be had, that publication be made; and that upon a final hearing of this cause this Court will decree that the C. V. & C. Line is liable to the holders, and through the holders to the plaintiffs, for the value of each of the lots of cotton covered by the plaintiffs' policies and the bills of lading of the C. V. & C. Line, and will apply the insurance effected by the Merchants' Cotton Press and Storage Company uncollected, rendering proper decrees therefor against the Merchants' Cotton Press and Storage Company and the defendant fire insurance companies in exoneration of that liability, giving the proportionate share to the plaintiffs severally, and to such of the defendants as stand in relation to the cotton as the plaintiffs do; that the Court will enforce the trust in the Senatobia street shed for the benefit of the plaintiffs and others, to the end that the plaintiffs, and others similarly situated as the plaintiffs, may be fully paid the value of the aforesaid cotton covered under their respective policies of insurance, and distribute the residue, if any there be, to the holders of the certificates issued by the Compress Company, some of which are held by defendants Napoleon Hill and S. R. Montgomery, who are called upon to produce a specimen of them; and that the said Hill is asked to furnish a list of the holders of such certificates, that they may be made parties thereto, they belonging to a numerous class, and their names unknown to the plaintiffs.

"And the plaintiffs pray for such other relief, general and special, as may be consistent with the facts of the case, and requisite and necessary, in order to determine and settle all the rights of the parties to the controversy.

"This is the first application for a writ of attachment."

Contemporaneously with the filing of the original bill, Anthony J. Thomas and Charles E. Tracy, by leave of the Circuit Court of the United States for the Southern District of Illinois, filed in this suit a cross bill for the use of the Delaware Insurance Company, and the Tremont and Suffolk Mills, and the Delaware Insurance Company filed its answer.

By the cross bill the receivers admitted their liability for the loss of 500 bales of cotton of the Tremont and Suffolk Mills, and propounded, by the approval of the Hon. Walter Q. Gresham, Circuit Judge of the United States, their rights of action against the Merchants' Cotton Press and Storage Company, and against the defendant fire insurance companies, severally, for the proportionate share of the amounts due from them respectively as would be applicable to the share of the Delaware Insurance Company in right of the Tremont and Suffolk Mills, in the distribution of the proceeds arising from the collection of said claims.

Shortly after the original bill was filed, R. H. Deming & Co. and the Phenix Insurance Company filed their answer and cross bill, and therein propounded the right of action of that firm against the receivers and against the N. N. & M. V. Co., a Connecticut corporation, on an alleged joint liability as to several hundred bales of cotton. The N. N. & M. V. Co. was an initial carrier at Memphis, having a contract with the Merchants' Cotton Press and Storage Company of like tenor and effect with that of the receivers of the C. V. & C. Line.

In the original bill and in the several cross-bills a confederation was averred between the Merchants' Cotton Press and Storage Company and the fire insurance companies, and the proofs showed that between the appellant fire companies and the Compress Company the following stipulation was entered into shortly after the fire: —

"Be it remembered, that the Merchants' Cotton Press and Storage Company of Memphis, Tenn., in making these proofs of loss against the fire insurance companies enumerated in Schedule A, annexed hereto, namely, for ten hundred and thirty-eight (1038) bales of cotton, valued as above set forth, burned in the West Navy Yard Compress (sometimes designated as No. 4), on the seven-

teenth day of November, 1887, submits the said proofs as representative of all claims which, up to this date, have been presented against it and right of claimants admitted, rights of all other claimants being denied for any other part of the whole loss of 13,966 bales of cotton as set forth in the annexed Schedule C; but in the event of litigation in respect of said loss (the said Merchants' Cotton Press and Storage Company hereby stipulating and agreeing to defend all suits which may be instituted against it, with the best legal talent attainable, to the final determination thereof in the courts of last resort) and the adjudication by said courts fixing the liability of the Merchants' Cotton Press and Storage Company to the owners (at the actual cash market value on the seventeenth day of November, 1887), the Merchants' Cotton Press and Storage Company then, in that event, reserves the right to make additional claims on the said insurance companies in accord with and up to the judgment entered against it in the said courts of last resort; and in the event of the settlement of any disputed claims by compromise, by concurrent action of the Merchants' Cotton Press and Storage Company and the insurance companies, or a committee representing them, the Merchants' Cotton Press and Storage Company in that event also reserves the right to make claims on the insurance companies therefor, on the basis of five-twelfths of the amount paid on said compromise settlements; and the insurance company in the acceptance of these proofs and the claim herein made, thereby binds itself to recognize and to pay *pro rata* such additional claims, whether by judgment or compromise, rendered or made as aforesaid, not exceeding the remainder due under its policy."

Within time, six of the fire insurance companies filed an insufficient and manifestly defective petition for the removal of the suit to the Circuit Court of the United States for the Western District of Tennessee, and thereupon made application to the Chancellor to stay proceedings in the cause. The Chancellor took the application under advisement. While he was considering it, and on the twenty-second day of September, 1891, the complainants and cross-complainants joined in filing an amended bill, to correct a mistake in their original and cross bills, in the averment and admission that the C. V. & C. Line was a corporation by the laws of Illinois, and

to say it was a trade-mark name, under which the receivers were operating the Cairo Division of the Wabash, St. Louis & Pacific Railway.

On the 24th of September thereafter, Anthony J. Thomas and Charles E. Tracy, receivers of the said Cairo Division, under appointment of the Circuit Court of the United States for the Southern District of Illinois, filed their answer, wherein they severally denied their liabilities for the loss of the cotton covered under all the bills of lading issued by them, except the bill of lading held by the Tremont and Suffolk Mills; and also by leave of the Circuit Court of the United States, for the district aforesaid, they filed their cross bill against the Merchants' Cotton Press and Storage Company and the other appellants, asserting rights of action against them, growing out of the matters and things set out in the following paragraphs thereof:

"That by the obligations imposed by the above mentioned written contract of May 24, 1887, "Exhibit A," with this cross bill, it was the duty of the Merchants' Cotton Press and Storage Company to take out in good and solvent insurance companies policies of insurance so as to cover the full value of the several hereinbefore mentioned lots of cotton, and by the said insurance thus taken out to provide a fund equal to the value of the aforesaid cotton at the time of its destruction. That in addition to the obligations imposed by said contract upon the Merchants' Cotton Press and Storage Company, to take out in good and solvent insurance companies, for the benefit of these cross complainants as receivers, as aforesaid, insurance to cover any loss while such cotton was in the possession or under the control of the Merchants' Cotton Press and Storage Company, and until delivered on steamboats or in cars to these cross complainants or their agents. It was also the plain and imperative duty of that company to collect the insurance thus taken out immediately after the said fire, and to continue to hold said insurance moneys so collected in trust for the benefit of cross complainants as such receivers until the liability, if any, of these cross complainants should be determined.

"That the Merchants' Cotton Press and Storage Company wholly failed to comply with and perform the conditions, stipulations and

obligations of its said written contract of May 24, 1887, in this, to wit: That it failed to take out insurance in good and solvent companies for the benefit of these cross complainants, as such receivers, covering any loss while the cotton mentioned and described in the pleadings herein was in the possession of and under the control of the said Merchants' Cotton Press and Storage Company, covered under the bills of lading of these cross complainants, but, on the contrary, in violation of the obligations of its said contract, it took out upon the aforesaid cotton, in good and solvent insurance companies, insurance in the aggregate sum amounting to only about $200,000; and in utter disregard of the obligations imposed upon it by said contract, it took out in insurance companies which were not 'good and solvent companies,' within the intent and meaning of said written contract, but were insolvent or wholly unauthorized to transact business of insurance in the State of Tennessee, under the laws thereof, in the aggregate amount of about $101,750. That only the following-named insurance companies were 'good and solvent companies,' within the intent and meaning of the said written contract, at the time the policies were taken out by the Merchants' Cotton Press and Storage Company upon said cotton, pursuant to said contract, namely: the Continental Insurance Company of New York; the Liverpool and London and Globe Insurance Company, of England; the Fire Association of New York; the Mutual Fire Insurance Company of New York; the National Fire Insurance Company of Connecticut; the Phenix Insurance Company of New York, and the Royal Insurance Company of England, they being alone authorized to do business in the State of Tennessee, by reason of compliance on their part with the laws of the State of Tennessee.

"That the Merchants' Cotton Press and Storage Company is liable to cross complainants for its failure to take out such insurance, in good and solvent companies, in the amount equal to the full value of the aforesaid several lots of cotton, with interest thereon from and after Nov. 17, 1887, because said Merchants' Cotton Press and Storage Company has not only failed to take out adequate insurance in good and solvent companies, but has wholly failed and refused to collect, or attempt to collect, the insurance taken out and carried by it on said cotton, in good and solvent insurance companies, and has

wrongfully appropriated of the insurance paid over to it the sum of about $4,394.12, which was applicable to the indemnity of these cross complainants, as such receivers, in case they are held and decreed liable under their said bills of lading, for the loss of the said cotton.

"That under its said contract it was the plain and manifest duty of the said Merchants' Cotton Press and Storage Company to take out, for the benefit and indemnity of cross complainants, as receivers as aforesaid, insurance in good and solvent companies, authorized by the laws of the State of Tennessee to transact insurance business in said State, and amenable to the laws and judicial process of said State, ample to cover the full value of all cotton while in its possession and upon its premises, under and pursuant to said contract; and that it was its plain and manifest duty, immediately after the destruction of said cotton by said fire, to collect by suit or otherwise, all insurance held by it for the benefit and indemnity of cross complainants as such receivers as aforesaid, and all other carriers with which it had contracts of like tenor and effect, and to hold said insurance money so collected, as trustees, in trust for the benefit and indemnity of cross complainants, and all other carriers with which it had like contracts, until the liability, if any there be, of cross complainants as receivers as aforesaid, and other carriers holding like contracts, might be adjudicated and determined. And that it was and is the further plain and manifest duty of said Merchants' Cotton Press and Storage Company, under its said contract with cross complainants, to hold itself liable to respondent in cash for any deficit in the said indemnity fund provided by said contract, occasioned by its failure to take out and carry insurance in good and solvent companies amply sufficient to fully cover any loss that could occur, by reason of the destruction of said cotton, while in its possession and upon its premises, under and pursuant to said contract; the true purpose, meaning and intent of said contract being to hold cross complainants, as such receivers, absolutely harmless, and indemnified as to all cotton covered by their bills of lading, so long as the same remained in possession and upon the premises of said Merchants' Cotton Press and Storage Company. But that said Merchants' Cotton Press and Storage Company, in utter disregard

of its duties and obligations imposed upon it by said contract, not only failed to take out insurance in good and solvent companies sufficient to cover the full value of said cotton, as required by said contract, but, after said fire, failed and refused to collect the insurance it did hold in good and solvent companies, and hold the same in trust for the benefit and indemnity of cross complainants, as receivers aforesaid, but, on the contrary, cross complainants are informed, and upon information aver the fact to be, that shortly after said fire said Merchants' Cotton Press and Storage Company entered into a combination or conspiracy with the several fire insurance companies last hereinabove mentioned, which said fire insurance companies are defendants to this cross bill, to prevent and defeat the collection of the insurance held by it in said fire insurance companies for the benefit and indemnity of cross complainants and other carriers holding contracts of like tenor and effect with the said contract of cross complainants. That in furtherance of said combination and conspiracy, as cross complainants are informed, and upon information aver the fact to be, said Merchants' Cotton Press and Storage Company and said fire insurance companies made and entered into an agreement and joint understanding to make a common defense against any liability either upon the part of the Merchants' Cotton Press and Storage Company or said fire insuranee companies for the loss of any cotton destroyed by said fire, excepting only such cotton as rested upon dray tickets or receipts issued by said Merchants' Cotton Press and Storage Company, and was not covered by or under any other contract or insurance; and that under and by reason of said combination, conspiracy and joint understanding, pursuant thereto, the said Merchants' Cotton Press and Storage Company has failed and refused, although requested so to do, to collect, receive and hold as trustee, in trust for the benefit and indemnity of cross complainants, and other carriers holding like contracts with theirs, the insurance due from said insurance companies joining in said joint understanding. And cross complainants aver that this action upon the part of said Merchants' Cotton Press and Storage Company was, in effect, an agreement by it, as trustee, to defeat the trust for which it was trustee, and was, and is, a gross violation of its said contract with cross complainants, by reason whereof it is, in law and equity, liable

to cross complainants not only for the full amount of the insurance held by it in said companies combining in said joint understanding, together with interest thereon, from the time the same should have been by it collected, but is, in law and equity, liable to cross complainants for the full value of all cotton destroyed by said fire, and covered under the bills of lading issued by cross complainants as such receivers as aforesaid. And that by said combination, conspiracy and wrongful acts of the said Merchants' Cotton Press and Storage Company, in connection with said fire insurance companies, the said fire insurance companies have become, and are, in equity, liable directly to cross complainants, and other carriers holding like contracts with theirs, for the full amount named in the policies of insurance issued to them by the Merchants' Cotton Press and Storage Company, together with interest thereon."

After the filing of this answer and cross bill and dismissal of the suit against the Home Insurance Company, the original petitioners applied for leave to amend their petition. Leave was granted, and on the twenty-second day of November, 1891, an amended petition was filed. This petition was also unverified. The controversies were therein set forth to be the claim of the complainants "in their bill" and the cross complainants "in the cross bills"; that the "petitioners and other fire insurance companies named as defendants to said bill that had issued policies to the said Merchants' Cotton Press and Storage Company (said company being the assured therein) were liable to the said Merchants' Cotton Press and Storage company, as trustees for them and other marine insurance companies in like situation to them, for the full unpaid balance of the policies issued by each of the fire insurance companies." And also the claim that "the said C. V. & C. Line was and is liable to them respectively for the loss of such lots of cotton covered by bills of lading; that the defendant, the said Merchants' Cotton Press and Storage Company, held and holds said fire policies as indemnity to the said C. V. & C. Line against that liability, and that they, the said plaintiffs, and other marine insurance companies standing in like situation, are entitled to enforce the alleged liability of petitioners and the other fire insurance companies therein named as defendants for the indemnity directly of the said C. V. & C. Line of the losses

accruing to their respective assured by the destruction by the fire aforesaid."

The petitioners averred (and that was the amendment) their citizenship (omitted in the original petition) and stated as a conclusion from their premises that the controversy is wholly between citizens of different States, or between citizens of one or more of the several States, and foreign citizens and subjects, and that the same can be fully determined as between them. Petitioners further set forth that "the Merchant's Cotton Press and Storage Company is the assured in the policies issued by the said fire insurance companies, and that the sole question, so far as concerned the said fire insurance companies, is, whether the said Merchants' Cotton Press and Storage Company, the defendant upon record, can recover against the fire insurance companies on their respective policies, as set out in the bill of complaint in behalf of the plaintiff and others in like situation, or in behalf of the C. V. & C. Line? Petitioners further state and show the amounts in controversy, as between the plaintiff and each of the said petitioners, exceed the sum of two thousand dollars exclusive of interest and costs."

The Merchants' Cotton Press and Storage Company thereafter filed its separate answer, and the insurance companies filed their joint and several answers, making defenses identical in substance.

The cause was heard on the pleadings and proofs; on the *merits* decided in favor of the complainants, and cross complainants, and against the receivers of the C. V. & C. Line, and in their favor against the plaintiffs in error. The cross bill of the Phenix Insurance Company, and the amended bill of the Insurance Company of North America against the Newport News and Mississippi Valley Company, the Connecticut corporation, were dismissed.

At its April term, 1893, the cause was heard by the Supreme Court of the State of Tennessee, and the decision of the Chancery Court in all things affirmed.

There are two errors assigned to the judgment: first, that it denies to the plaintiffs in error, severally, the right of removal; second, the denial of an immunity from their several liabilities on collateral and distinct contracts, because the C. V. & C. Line granted shippers a discriminating rate of freight.

ARGUMENT.

It will be convenient to consider the assignments of error in the order stated.

I.

The denial of the right of removal presents no Federal question.

The relation of the Merchants' Cotton Press and Storage Company, hereafter called the Storage Company, and the Fire Insurance Companies, hereafter called the Fire Insurers, to the controversies between the Marine Companies and Anthony J. Thomas and Chas. E. Tracy, arises out of an agreement by which the Storage Company stipulated it would take out insurance in good and solvent companies on all cotton deposited with it for compression; its partial breach of contract in that regard, and insurance in forty-four companies, aggregating $301,750.00, and a total loss of 14,000 bales of cotton of the value of $700,000.00, to which policies granted by the Fire Insurers herein, aggregating $185,000.00, were applicable.

The rights and liabilities of all the parties to this suit (except the receivers) and also of other carriers not parties were fully settled in two cases decided by the Supreme Court of the State of Tennessee, Lancaster Mills *v.* I. B. & W. R. R., 89 Tenn. 1, and Consolidated Compress Cases, 90 Tenn. 306.

In the last of the above cases that court affirmed that that suit in equity could not be entertained, and a decree rendered affecting the C. V. & C. Line, because it was not before the court and was an indispensable party.

> Swan Land and Cattle Company *v.* Frank, 148 U. S. 611.
> Porter *v.* Sabin, 149 U. S. 479.

After this decision in the Consolidated Compress cases, *supra*, between the parties to this litigation, there was left one undecided question. Every other one had been determined, and was *res adjudicata* as between the parties to this suit.

The open question was the liability of the C. V. & C. Line for the losses of cotton covered under its bills of lading. Collateral to that, and dependent upon it, were the liabilities of the Storage Company and the Fire Insurers.

The Supreme Court of Tennessee expressed its views on the removal question through Snodgrass, J., who said: —

"We hold that the real controversy in the case is between the marine insurers complaining and those for whom they sue, and the receivers of the Cairo, Vincennes & Chicago Line, defendants.

"The object of the controversy was to charge that line with loss sustained by shippers and paid by these complaining companies, and incidentally to collect of other defendants — the fire companies — whatever decree might be obtained.

"These defendants, though made such to the bill, as formal parties, occupied substantially the position of garnishees, and were made defendants only that their indebtedness on account of insurance obligations might be reached and held subject to such final decree as complainants might obtain against the Cairo, Vincennes & Chicago Line; and no separable controversy, in the sense of the statute, is thus presented or otherwise arises as to them on any proper re-arrangement of parties. *Bacon* v. *Rives*, 106 U. S. 99–108.

"The position that this is, in fact, a suit between the Merchants' Cotton Press and Storage Company and the fire companies — being 'virtually a suit by the former against the latter' — is not maintainable; nor that the decree, must, of necessity, be in its name against such companies, for, though the decree might take that form, it is not essential that it should do so, as it may properly recite facts of failure and refusal of that company — the nominal assured — to sue and adjudge liability directly in favor of complainants after proper account stated, all parties being before the court — the Merchants' Cotton Press and Storage Company as defendants.

"The Merchants' Cotton Press and Storage Company, whose duty it was, as trustee, to sue for and collect and appropriate to proper parties the insurance effected by it for them, having neglected and refused to do so, the marine insurers had, therefore, the right to join it as defendant, and make all the fire insurance companies defendants, and have exact liability of each fixed and adjudged in complainants' favor.

"It may be true that complainants, after obtaining decree against the Cairo, Vincennes & Chicago Line, might have sued each fire insurance company separately for its proportion of the insurance, to

which, by virtue of such recovery, complainants might have been authorized to subject it; but the same is true in respect to appropriation of indebtedness of garnishees; and yet it does not follow that, for such reason, such debtors may not all be proceeded against at the same time, and with a view to hold such indebtedness to satisfy a prospective recovery under the general principles of equity and under our statute (M. &. V., Code, § 4200), nor change the fact that the litigation with them is but incidental to the main controversy.

"If complainants fail in that, no controversy remains, and no question for settlement between any parties to the suit. The marine insurers had no right of action against any of these fire companies except as incidental to its litigation with this carrier. These fire companies, in the language of Railroad Company *v.* Wilson, 114 U. S. 60–62, 'are made parties only in aid of the principal relief which is asked,' and 'no relief whatever can be granted' unless a judgment is obtained against the carrier, and 'as to that controversy the carrier is an indispensable party.' 'The sole purpose of the suit' is to obtain the judgment and secure its collection. 'The suit is therefore against both, on a single cause of action.'

"The quotations which we have made from the Wilson case are not, it is true, of a controversy exactly the same in fact, but we think the same in principle, as are also those of Crump *v.* Thurber, 115 U. S. 56–61; and Fidelity Insurance, Trust and Safe Deposit Company *v.* Huntington, 117 U. S. 280–282.

"This case, too, like the last one cited, is peculiarly one in which all the fire companies, with the defaulting trustee, the Merchants' Cotton Press and Storage Company, should have been joined. There was no separate insurance on particular cotton, or in favor of a particular owner or carrier.

"The liability of each defendant is the object of an equitable account, and the recovery of each complainant depends upon it. Each insurer is in equity indebted to each carrier in some amount, and the Merchants' Cotton Press and Storage Company for the remainder, as decreed by the Chancellor."

91 Tenn. 539–542.

Before elaborating the argument that no Federal question is properly raised in the denial of the right of removal, the assignment of error therefor by the Merchants' Cotton Press and Storage Company and the Mutual Fire Insurance Company deserves a passing notice.

1. Neither one of these plaintiffs in error asked for the transfer of this suit; therefore the judgment of the Supreme Court of Tennessee affirming the denial of the right by the Chancery Court of Shelby County, Tennessee, to the other plaintiffs in error, cannot be re-examined upon error assigned therefor by the Storage Company and Mutual Insurance Company.

McNulta *v.* Lochridge, 141 U. S. 331.
Missouri *v.* Andriano, 138 U. S. 496.

2. And next on this point, the assignment of error of the Royal Insurance Company and the Liverpool and London and Globe Insurance Company may be distinctly noticed.

They are aliens, assigning error to the refusal to them of a right to remove a suit because there is a separable controversy in it between them and a citizen of Tennessee, according to the allegation of a mere conclusion, which they make in their petition. There is no provision in the laws of the United States entitling an alien to remove a suit because of being a party defendant to a separable controversy in it.

King *v.* Cornell, 106 U. S. 398.

3. This brings us to the argument of the proposition that the denial of the right of transfer raises a Federal question re-examinable upon the assignment of error of the other petitioning defendants.

The three petitioners to whom the Supreme Court of the State of Tennessee denied this right, that have a shadow of standing on the record, are the Continental Insurance Company, the Fire Association, and the National Insurance Company, the two former corporations of New York, and the latter a corporation of Connecticut.

The domicils of these corporations are not shown by the records.

Jackson *v.* Ashton, 8 Pet. * 148.

The jurisdiction of the Circuit Court of the United States for the Western District of Tennessee is a limited one. It depends either upon the existence of a Federal question, or the diverse citizenship of the parties to a suit where the matter in dispute exceeds the sum of $2,000, exclusive of interests and costs.

Byers *v.* McAuley, 149 U. S. 619.

Where the whole controversy is between citizens of different States, all the parties on one side of that controversy must be citizens of different States from all the parties on the other side.

Strawbridge *v.* Curtiss, 3 Cranch, 267.
Smith *v.* Lyon, 133 U. S. 318.
Removal Cases, 100 U. S. 457.
Railroad *v.* Mills, 113 U. S. 256.
Akers *v.* Akers, 117 U. S. 197.
Coal Co. *v.* Blatchford, 11 Wall. 172.

And when, in any suit cognizable in the Circuit Court of the United States, there is a separable controversy, by the settled construction of the third clause of Section 2 of the Act of the 3d of March, 1887, as corrected by the Act of the 13th of August, 1888, the whole subject matter of the separable suit must be capable of being finally determined as between the parties thereto, and complete relief afforded as to the separate cause of action, without the presence of others originally made parties to the suit.

Hyde *v.* Ruble, 104 U. S. 407.
Corbin *v.* Van Brunt, 105 U. S. 576.
Fraser *v.* Jennison, 106 U. S. 191.
Winchester *v.* Loud, 108 U. S. 130.
Shainwald *v.* Lewis, 108 U. S. 158.
Ayres *v.* Wiswall, 112 U. S. 187.
Fidelity Ins. Co. *v.* Huntington, 117 U. S. 280.
Graves *v.* Corbin, 132 U. S. 571.
Brown *v.* Trousdale, 138 U. S. 389.

Before a separable controversy can be said to exist in a suit, there must be, in that suit, two or more distinct causes of action

upon which separate suits, each distinct in itself, might have been properly brought, and complete relief afforded in each suit as to the particular controversy involved.

Hyde *v.* Ruble, *supra.*

The matter in dispute in such distinct and separable controversy must exceed the sum of $2,000, exclusive of interest and costs, and the requisite diverse citizenship must exist before the suit can be transferred upon the petition for removal into the Circuit Court of the United States by one or more of the defendants actually interested therein.

Penn. Co., Petitioner, 137 U. S. 455.
Torrence *v.* Shedd, 144 U. S. 527.

It is indispensable, before the State court is required to surrender its jurisdiction of this suit, that the petitioners, or one of them, file in that court a removal petition and give the required security, stating therein facts sufficient to entitle them or him to have the transfer made. This cannot be done without showing the Circuit Court of the United States, for the Western District of Tennessee would have jurisdiction of the suit when transferred.

R. R. Co. *v.* Ramsey, 22 Wall. 328.

If such petition be filed, and it fails to show the citizenship of the parties, it is manifestly defective.

Crehore *v.* R. R., 131 U. S. 240.

The jurisdiction of the Circuit Court of the United States for the Western District of Tennessee over this suit rests and depends upon the statement made in the petition for its transfer into that court, and verified by the oath of the petitioner.

Virginia *v.* Paul, 148 U. S. 123.
Virginia *v.* Rives, 100 U. S. 313.
Crehore *v.* R. R., *supra.*
Graves *v.* Corbin, 132 U. S. 571.

A real and not a fictitious Federal question is essential to the

jurisdiction of this court to re-examine the judgment of the Supreme Court of Tennessee.

Hamblin *v.* Western L. Co., 147 U. S. 531.

For the defendants in error the contention is that upon the principles settled by this court in the above cases and others, and in Penn. Co. *v.* Bender, 148 U. S. 255, the petition which is filed for the transfer of this suit is so manifestly defective that its denial by the Chancery Court of Tennessee, and the trial and judgment on the merits by that court, and the affirmance thereof by the Supreme Court of Tennessee, raises no Federal question.

The record shows that there is no controversy in the suit between the Storage Company and the Fire Insurers, or either of them; on the contrary, a combination and conspiracy to defeat the very object which the C. V. & C., line had in view when it entered into the contract of the 24th of May, 1887, to provide policies of insurance in good and solvent companies, collectible and to be collected by the Storage Company, for the indemnity of that line. The allegations in the several pleadings touching the relations that then existed between the Storage Company and the Fire Insurers, when the petition for removal was filed, are substantially as follows: —

"That the Merchants' Cotton Press and Storage Company had failed to perform its duty in collecting the insurance which it had really taken out, and that it has continued to fail in performing this duty, notwithstanding it was declared to be its duty by the Chancery Court of Shelby County, Tennessee, in the Lancaster Mills case and the Coates case, and by the Supreme Court of Tennessee, upon the hearing of the appeals in those two cases, and again by the Supreme Court of Tennessee, in a judgment pronounced in the Deming case." "That instead of collecting the insurance, it made common cause with its insurers, and took no steps whatever to collect the insurance, and whereby it is believed, etc."

"That the Merchants' Cotton Press and Storage Company were requested by the Cairo, Vincennes & Chicago Line, by its duly accredited representatives, to collect and pay over the insurance applicable to the lots of cotton covered under the bills of lading of the said line, and pay any deficit out of its own funds, and yet, notwithstanding such request, it refuses to make such collections

and pay to the parties entitled thereto, the insurance provided as an indemnity to the Cairo Line, and has wholly failed to collect any part of the insurance which the Supreme Court declared a trust upon, for the benefit of the Cairo Line, but has, from the very inception of this controversy, made common cause with its insurers, and placed every obstacle in the way of the collection of the said insurance, without its being made to appear that it was really putting obstacles in the way of the performance of its duty, repeatedly declared by this court and the Supreme Court of Tennessee."

Thus, the petition shows on its face, read in the light of the record, that the sole question upon which the transfer is asked is an ideal one. This court has settled that where such a combination is charged in the bill against defendants, as between them, no separable controversy can exist.

In Wilder *v.* Virginia, Iron Co. 46 F. R. 676, Chief Justice Fuller, on the Circuit, considering the contention that there was a separable controversy between two defendants upon similar allegations in the bill of complaint, among other things, said: —

"It is said there is a separable controversy between the complainants and the New Jersey Company, upon the allegations that the Bristol Land Company was organized for the benefit of some individual defendants, and with the intent to defraud the New Jersey Company and its stockholders and creditors, and that the New Jersey Company had conveyed lands to the Bristol Land Company, without any valuable consideration, and in fraud, and at great loss; but as to that controversy the Bristol Land Company, and the individual defendants in question, are indispensable parties, and, besides, the combination charged makes the New Jersey Company rightly and necessarily a party co-defendant with the Bristol Company. The theory of the bill is the right of complainants to have the entire assets of the New Jersey Company brought into court, for the purpose of distribution, and that, under its averments, involves the winding up of the various other corporations. If the New Jersey corporation could be considered as complainant, and the Virginia Company defendants, there would be a separable controversy between them; but they cannot be so arranged under the circumstances. For the purpose of determining whether a controversy is

separable the allegations in the bill must be taken as true, and the combination charged between these defendants viewed in that light does not present a separable controversy."

Railroad Co. *v.* Grayson, 119 U. S. 240; s. c. 7 Sup. Ct. Reporter, 190.

Railroad Co. *v.* Mills, 113 U. S. 249; s. c. 5 Sup. Ct. Reporter, 456.

The test of a right claimed must be determined by the case made by the pleadings at the time the petition is filed; and the test of the sufficiency of the petition is the averments in it.

Graves *v.* Corbin, 132 U. S. 585.

The bill does not aver facts tending to show any separable controversy between the petitioners or either of them, and any of the other parties to the suit. On the contrary, the bill is an indivisible cause of action as to the petitioners. While each of the marine companies has separate and distinct rights growing out of several contracts, they have elected to join in enforcing an obligation common to them all, to wit, the obligation of the C. V. & C. Line to ratably distribute among them the proceeds of policies of insurance provided by that line to take the place of owners' cotton destroyed, and of which insurance, the C. V. & C. Line is a trustee for them.

Peninsular Iron Co. *v.* Stone, 121 U. S. 631.
Bank of Rome *v.* Haselton, 15 Lea, 430.
Hutchinson on Carriers, Sect. 412; 2d Ed. Sect. 429.
Cal. Ins. Co. *v.* Union Compress Co., 133 U. S. 401.
Baltimore Warehouse Case, 93 U. S. 527.
London & N. W. Ry. *v.* Glyn, 1 Ell. and Ell. 652.

What the marine companies seek is not alone to establish their claims against the C. V. & C. Line, but the active aid of a court of equity to enforce their several legal demands by the collection of choses in action, four of which are the unpaid balances on the two policies of insurance of the Continental Insurance Company, the one policy of the Fire Association, and the one of the National Insurance Company.

The suit is as to the appellants, therefore, of the class of the Fidelity Insurance Company *v.* Huntington, 117 U. S. 280.

Bellaire *v.* B. & O. R. R., 146 U. S. 119.
Graves *v.* Corbin, 132 U. S. 571–588.
Torrence *v.* Shedd, 144 U. S. 527–532.

The collection of whatever may be due, if anything chances to be (for no amount is alleged to be due) from the above insurers, is incidental to its main object. Hence controversies growing out of the appendages to the suit between the complainants and the fire insurers could not be determined as between them, without the presence of the C. V. & C. Line.

To enforce their several legal demands, the three marine companies (complainants) assert a statutory right in the State court by attachments levied by "garnishing the defendant fire insurance companies to answer and state what, if anything, they owe upon their respective policies, applicable to the liability of the C. V. & C. Line, if liability be declared herein, or by any court with the parties requisite to the validity of such judgment before the court."

The amount in dispute between the marine companies (on the petition designated the "plaintiffs"), and each of the petitioning defendants, is stated thereon, and not elsewhere shown, to exceed the sum of two thousand dollars ($2,000), exclusive of interest and costs. It is manifest that the suit is not removable by the two New York defendants that petitioned therefor. One of the "plaintiffs" is shown on the petition, and not elsewhere, to be a citizen of New York, and the C. V. & C. Line receivers are shown to be citizens of New York.

And the allegation that the requisite amount in controversy, as between "the said plaintiffs" and "each of the petitioning defendants," is one of conclusion. It is unfounded. The Insurance Company of North America, if entitled to its proportionate share upon the policies of insurance of these petitioning defendants, would be entitled to about three one hundredths of the amount due from each; less than $450 from the Continental and $300 from the Fire Association, and from the National Insurance Company less than $150.

It was once suggested (and may be again) that in this suit were

several controversies to be found -- one between each of the marine companies that asserted the right of owners against carriers — and in each of these was to be found other and wholly distinct causes of action, one of which is a suit by the receivers and the Phenix Insurance Company of New York, and the National Insurance Company, a "*citizen of Connecticut*," where the requisite jurisdictional amount and diversity of citizenship exist. And it being a separable controversy, upon the petition of the National Insurance Company this suit is removable.

It is sufficient to say that the National Insurance Company filed no petition for the removal of any controversy to be found in the cross bill of the Phenix Insurance Company.

Rand *v.* Walker, 117 U. S. 345.

To reach the indebtedness due by the National Insurance Company to these two carriers, or either of them, they are indispensable parties defendant.

U. S. *v.* Howland, 4 Wheaton, 108 — per Chief Justice Marshall.

And, however this suit be classified, the National Insurance Company is a defendant as garnishee.

Ogilvie *v.* Ins. Co. 18 How. 577.
Lewis *v.* Woodfolk, 2 Jere Baxter, 25.
Peak *v.* Buck, 3 Jere Baxter, 71.
Cook *v.* Whitney, 3 Wood. 715.
Weeks *v.* Billings, 55 N. H. 371.
Dewey *v.* West Fairmount Co., 123 U. S. 333.

In Bacon *v.* Rives, 106 U. S. 99, Mr. Justice Harlan stated the rule applicable to the jurisdiction of the Circuit Courts of the United States on the ground of the diversity of citizenship of the parties, as follows: —

"The necessary parties, on the respective sides of the controversy which is the foundation of the litigation, being citizens of different States, the relation of the executors to the suit was properly regarded as merely incidental, arising from the necessity of preserv-

ing the means whereby the complainants might, if successful in this suit, obtain satisfaction of their demands against Geo. C. Rives."

If the petition had fully set forth the facts upon which the ideal distinct cause of action between it and the original parties to this cross bill is supposed to arise, that controversy is an incidental one and not within the removal acts.

Bank *v.* Turnbull, 16 Wall. 190.
Barrow *v.* Hunton, 99 U. S. 80.
Bacon *v.* Rives, *supra.*

Again, jurisdictional diversity of citizenship is not shown. The cross bill of the Phenix Insurance Company, so far as responsive to the matters in the original bill, is auxiliary. The extraneous matter therein makes it of the nature of an original bill.

Interested on the same side with the Phenix Insurance Company in maintaining the liability of the National Insurance Company are the C. V. & C. Line and the N. N. & M. V. Company, a Connecticut corporation (properly made defendant to cross bill, Hildebrand *v.* Beasley, 7 Heiskell, 121), against whom the Phenix Insurance Company propounded a claim for the value of several hundred bales of cotton. Dependent upon its liability for the value of such cotton is the liability of the National Insurance Company to it, for the contract of the N. N. & M. V. Co. with the Storage Company is of like tenor and effect as that of the receivers.

It may be conceded that a Court of Equity has jurisdiction where there is one common right in the controversy, which is to be established by or against several persons — one person asserting a right against many, or many against one, to determine the whole matter in one action.

Bishop *v.* Rosenbaum, 58 Miss. 91.

If this suit is of that class the controversy is a united and inseparable one. If it is a statutory proceeding and belongs to the class of Cates *v.* Allen, 149 U. S. 451, it is not cognizable in the Circuit Court of the United States for the Western District of Tennessee, sitting in equity, and hence cannot be removed into it.

Whether this suit is one wholly between citizens of different

States, or whether in it there are several controversies, each of them between citizens of different States, and the matter in dispute, the jurisdictional amount, and the petitioning defendants actually interested in one of such separable controversies, and not mere garnishees, this court is without jurisdiction to re-examine the decision of the Supreme Court of Tennessee.

Gibson *v.* Bruce, 108 U. S. 561.

For according to the uniform decisions of this court, the jurisdiction of the Federal Court fails in a removal case, unless the necessary citizenship affirmatively appears in the pleadings or elsewhere in the record.

M. C. & L. R'y Co. *v.* Swan, 111 U. S. 382.

In the last cited case, Mr. Justice Matthews, delivering the opinion of this Court, said: —

"In every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

The petition filed herein on the fifth day of September, 1891, and the amended petition filed on the twenty-third day of November, 1891, set forth the status of the petitioners, as follows: —

"The Merchants' Cotton Press and Storage Company is a citizen of the State of Tennessee; that the C. V. & C. Line is a citizen of the State of Illinois, and that the petitioners are citizens and subjects of foreign States, or of other States than the States of Tennessee and Illinois, *the said Royal Insurance Co. and the said Liverpool, London and Globe Insurance Co. being citizens and subjects of Great Britain, the said Continental Insurance Co. and the said Fire Association being citizens of New York, the said Home Insurance Co. being a citizen of Louisiana, and the said National Insurance Co. being a citizen of the State of Connecticut*, and that the controversy is wholly between citizens of different States, or between citizens of one or more of the several States and foreign citizens and subjects, and that the same can be fully determined between them."

It being obvious that upon a petition filed by the five plaintiffs in error who joined in the petition for the transfer of the suit, where the controversy is alleged to be between a "company" as a citizen of the State of Tennessee, for the use of a "line," a citizen of the State of Illinois, that the mere recitation that the petitioners are citizens and subjects of foreign States, or other States than the States of Tennessee and Illinois, and that the controversy is wholly between citizens of different States, or between citizens of one or more of the several States and foreign citizens and subjects, and that the same can be fully determined between them, is not sufficient to show jurisdictional diversity of citizenship. The italics indicate the amendment of the original petition to cure the obvious defects of the jurisdictional fact. The amendment did not better the petition, because the averment of the citizenship of the petitioners, in the language of this court, speaking by Mr. Justice Curtis in the case of the *Lafayette Insurance Co.* v. *French*, 18 *Howard* 405, can have no sensible meaning attached to it. The learned justice proceeded to say: "This court does not hold that either a voluntary association of persons, or an association in a body politic created by law is a citizen of a State within the meaning of the Constitution."

It is to be noted that the sole question, so far as concerns the said fire insurance companies, is whether the Merchants' Cotton Press and Storage Company, a defendant on the record, can recover against the said fire insurance companies *on their respective policies as set out in the bill of complaint*, in behalf of the plaintiffs and others in like situation, or in behalf of the C. V. & C. Line. In the original petition, the alleged cause of action of the Merchants' Cotton Press and Storage Company against the petitioning defendants was wholly omitted. Its insertion by an amendment did not incorporate into the record any controversy between petitioners and the Merchants' Cotton Press and Storage Company, for it is too well settled to be the subject of discussion in this court, that a court of equity will not decree between defendants when neither pleadings nor proof show any controversy or adverse interest between them.

Graham *v.* Ry. Co., 3 Wall. 712.
Veach *v.* Rice, 131 U. S. 293.

Passing however, to the consideration of the question of whether or not the jurisdictional diversity of citizenship appeared elsewhere in the record, the cross bill of the receivers for the use of the Tremont & Suffolk Mills, and the answer and cross bill of R. H. Deming & Co., for the use of the Phenix Insurance Company, may be looked to, because it is conceded that if the corporate domicils of the petitioners appeared on the record within time, that the omission to set them forth on the petition would be immaterial; but when those pleadings are looked to, it will be found that they contain no averment whatever thereabouts. The first time the corporate domicils of the petitioners were set forth was on the 22d of September, 1891, when the amended and supplemental bill was filed. This suit was not removable upon a petition thereafter filed, because such petition would not have been in time.

Daughtry *v.* R. R. Co., 138 U. S. 298.

The point turns then on whether the averment of corporate creation and domicil in the caption of the original bill is sufficient to show the citizenship of the parties as of the date of the original bill, and the filing of the petition. It is settled that it is not, in an opinion of this court, delivered nearly sixty years ago in the case of

Jackson *v.* Ashton, *supra*,

by Chief Justice Marshall, who said, "The title or caption of a bill is no part of the bill, and does not remove the objection or defects in the pleadings. The bill and proceedings must state the citizenship of the parties to give the court jurisdiction of the case. The only difficulty which could arise to the dismissal of the bill presents itself upon the statement 'the defendant is a Philadelphian.' This, it might be answered, shows that he is a citizen of Pennsylvania. If this was a new question the court might decide otherwise, but the decision of the court in cases which have heretofore been before it has been expressed upon the point, and the bill must be dismissed for want of jurisdiction."

The case, we think, is within

Penn. Co. *v.* Bender, 148 U. S. 255.

II.

THE SECOND ASSIGNMENT OF ERROR DOES NOT RAISE A FEDERAL QUESTION.

The assignment of error as formulated presents a question of general law, and not a Federal question.

Grame *v.* Mutual Assurance Co., 112 U. S. 273.

One of the Federal questions it is insisted arises, upon the allegation of a conclusion, that the general law of the land was violated when Jones Bros. & Co. were granted a rebate of part of the freight money on shipments of cotton, river and rail, by the agent of C. V. & C. Line, which it is called, "making a discriminate and lower rate than the established rate." The pleading is lacking in essential statement of facts to raise the question.

Record, pages 116–135.

The second section of the Act to Regulate Commerce is violated when a common carrier, subject to the provisions of the Act, shall directly or indirectly, by any special rate, rebate, draw back or devise, charge, demand, collect or receive a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of the Act than it charges, demands, collects or receives from any other person or persons for doing for him or them a like cotemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, for then only is such carrier deemed guilty of an unjust discrimination, which is prohibited and declared unlawful.

The allegations in the answers of the plaintiffs in error fall very far short of charging a violation of the Act to Regulate Commerce. It is not designed to prevent competition between different roads or to interfere with the customary arrangements made by railroad companies for reduced rates in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons travelling over the route. In other words, it

is not intended to ignore the principle that one can sell at wholesale cheaper than retail. It is not all discriminations or preferences that fall within the prohibition of the statute, but only such as are unjust and unreasonable.

Interstate Commerce Com. *v.* B. & O. R. R., 145 U. S. 277.

To constitute an unjust discrimination, under Section 2, the carrier must charge or receive a greater or less compensation from another, or must accomplish it directly or indirectly by means of a special rate or other device, but in either case it must be for like and cotemporaneous service in the transportation of a like traffic under substantially similar circumstances and conditions.

Interstate Commerce Com. *v.* B. & O. R. R. Co., *supra.*

Mr. Justice Jackson, in his opinion in the above case, delivered in the Circuit Court, said:—

"Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and they shall not unjustly discriminate so as to give undue preference or advantage to persons or traffic similarly circumstanced, the Act to Regulate Commerce leaves common carriers as they were, at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally manage their important interests upon the same principles which are recognized as sound and adopted in other trades and pursuits. Conceding the same terms of contract to all persons equally, may not the carrier adopt both wholesale and retail rates for its transportation services?"

This court, in the decision of the above case, among other things, also said:—

"The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue and unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line, and to abolish combinations for the pooling of freights. It is

not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction does not operate as an unjust discrimination against other persons travelling over the road. In other words, it is not intended to ignore the principle that one can sell at wholesale cheaper than at retail."

In the light of the construction placed upon the Act to Regulate Commerce, the inquiry is, Are facts alleged by the plaintiffs in error, in the thirteenth and fourteenth paragraphs of their respective answers, where they set forth that the agent of the railroad company made to Jones Bros. & Co., shippers of cotton, what was called a rebate of a part of the freight money, thus making a discrimination or lower rate than the established rate by rail and river in favor of the said Jones Bros. & Co., in violation of the general laws of the land on the subject, sufficient to direct an inquiry as to the rights of the respective parties under the Act to Regulate Commerce? That the pleading does not set up any title, right, privilege or immunity claimed under that Act is manifest. It is essential that it shall, and also essential that the right, privilege or immunity claimed be claimed by the plaintiffs in error in their own right and not in right of a third party.

Bushnell *v.* Cook Mining Co., 148 U. S. 689.
Cook County *v.* Calumet, Chicago Canal Co., 138 U. S. 653.

What is claimed by the pleading is the invalidity of the bills of lading issued to Jones Bros. & Co. at a less rate than the established rate by rail and river, thus making a discriminative or lower rate in violation of the general law of the land on that subject. This falls very far short of claiming in a proper way and at the proper time any title, right, privilege, or immunity arising under the Constitution or any treaty or statute of the United States.

Long *v.* Converse, 91 U. S. 113.
Henderson *v.* Tenn., 10 How. *311.
Montgomery *v.* Hernandez, 12 Wheat. 129.
Owings *v.* Norwood, 5 Cranch, 344.
Wynn *v.* Morris, 20 How. *3.

Hale *v.* Gaines, 22 How. 144.
Miller *v.* Lancaster Bank, 106 U. S. 543.
McNulta *v.* Lochridge, 141 U. S. 331.

What is claimed as a defence by the plaintiffs in error to the rights of action asserted against them is the invalidity of the bills of lading issued to Jones Bros. & Co., because the carrier's agent made that firm a rebate. This is insufficient to raise a Federal question, for the right of a third person cannot be claimed by the plaintiffs in error. It must be a right in them before there is drawn into question the construction of the Act to Regulate Commerce or an authority exercised under it, or before any immunity is claimed thereunder.

Giles *v.* Little, 134 U. S. 645.
Owings *v.* Norwood, 5 Cranch, 344.

Again, the first section of the Act to Regulate Commerce limits its application to the common carrier or carriers engaged in the transportation of passengers or property, partly by railroad and partly by water when both are used under one common control, arrangement or management, for the continuous carriage from one state or territory to another state or territory. Unless the C. V. & C. Line and the river carrier to Cairo were under a common control, arrangement or management, it is quite evident that the former was not within the Act to Regulate Commerce.

Beach on Railroads, Sect. 1023.
Ayr Harbor Trustees *v.* Glasgow Ry. Co., 4 Ry. & Canal Traffic Cases, 812.

The office of a pleading is to state facts, and not to draw conclusions. It is obvious upon an examination of paragraphs in the answers of the plaintiffs in error that they do not raise a Federal question. That view was taken of the record by the learned Chancellor. Upon the appeal, however, to the Supreme Court, an assignment of error was filed by these plaintiffs in error insisting that they had a substantial defence by reason of some supposed violation of the Act to Regulate Commerce and were entitled to set up such violation in bar of any recovery upon their several contracts. The

contention in this behalf of the plaintiffs in error will, perhaps, be best understood from their assignment of error on the subject, filed to the judgment of the Supreme Court of Tennessee. That assignment is thus expressed: "2d. That the said Supreme Court of Tennessee found and held that the transactions mentioned in the records between Thomas and Tracy, receivers, through their agent, Fellows, on the one side and the firm of Jones Bros. & Co. on the other, did not constitute or amount to a violation of the Act of Congress entitled an Act to Regulate Commerce, approved Feb. 4, 1887, and the Acts amendatory thereof. It should have held that the contracts evidenced by the bills of lading on file were illegal and that no recoveries could be had thereon. That the receivers were at most bailees of the cotton in question, and that recoveries could be had against them only in the relation of bailees, the right of such recovery being negatived by the record as decided by the Supreme Court. Signed, Turley & Wright, Metcalf & Walker, Solicitors."

At this point it may be noted that the *bills of lading granted to Ellerton L. Dorr & Co., covering* 500 *bales of cotton destroyed in the fire of the* 17*th of November*, 1887, *the property of the Hill Manufacturing Company, are not involved in this assignment of error.* The transactions between the shippers of these cottons and the agent of the receivers are not questioned in this record. The assignment of error, however, directs an inquiry to the grounds of the judgment of the Supreme Court of Tennessee. They are set forth by Snodgrass, J., in his opinion. After stating the assignment of error and two of the three answers made thereto (the consideration of which the Court pretermitted), he said, —

"We are of opinion, however, and base our decision upon the ground, that if it was assumed that the law applicable and the fact of agreement for rebate and special rate proved, it could not avoid liability upon the part of the carrier for freight received and covered by insurance in the hands of the carrier's agent. The law makes such agreement as to rebates, etc., void, but it does not make the contract of affreightment otherwise void, and we think there is nothing in the law or policy of it which requires a construction that would excuse a carrier from a liability when it made such a contract

in connection with that for receipt and transportation of freight. Such a construction would encourage rather than discourage such unlawful agreements or rebates. The carrier might prefer that to liability for the freight. Such a contract as to rebate would be void, and, of course, agreed freight rate in violation of law could not be enforced, but we think the shipper could, nevertheless, recover for loss of his freight through the carrier's negligence, and incidentally of the five companies. No different construction has yet been put upon the interstate commerce law, so far as we are advised, and we decline to give it any other."

It is plain that the decision of the point turned upon the carrier having received the cottons, lodged them in the hands of the Storage Company, as its agent, and covered them by insurance.

The second section of the Act of 1867 gives this court jurisdiction to examine the final judgment or decree in any suit in the highest court of a State where any right, title, privilege or immunity is claimed under the Constitution, or any treaty or statute of or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority. In the case of Murdock *v.* Memphis, 20 Wallace, 635 this Court announced, among others, the following propositions: —

"*First.* That it is essential to the jurisdiction of this court over the judgment of the State court, that it shall appear that one of the questions mentioned in the Act must have been *raised and presented to the State court.*

"*Second.* That it must have been decided by the State court, or that its decision was necessary to the judgment or decree rendered in the case.

"*Third.* That the decision must have been against the right claimed or asserted by plaintiff in error under the Constitution, treaties, laws or authority of the United States."

It is manifest that the Supreme Court of the State of Tennessee did not have presented to it (for one was not raised) one of the questions set forth above. It is likewise manifest that it did not decide one of the questions, or that its decision was necessary to the

judgment rendered in this case, consequently the decision was not against the right claimed or asserted by the plaintiffs in error under the Constitution, treaties, laws or, authority of the United States.

Their now contention is, that Sects. 2 and 3 and Sect. 6 as amended by the Act of the 2d of March, 1889, of the Act to Regulate Commerce, were violated in the granting of "rebates" by the agent of the C. V. & C. Line to Jones Bros. & Co., cotton shippers at Memphis. This violation, plaintiffs in error claimed "to be with great certainty shown by the testimony of Walter Jones, the shipper, and upon a statement from his books."

Their proposition therefrom is that the patrons of the C. V. & C. Line were not put upon an absolute equality, but that Jones Bros. & Co. were favored. There is not a scintilla of evidence tending to show the granting of any other or different rate to Jones Bros. & Co. than to other shippers. On the contrary, the whole testimony shows the C. V. & C. Line dealt fairly with shippers, extended to them reasonable facilities for the transportation of their property, and put all of its patrons upon an absolute equality.

Union Pac. Ry. Co. *v.* Goodridge, 149 U. S. 691.

It is further insisted that the plaintiffs in error have immunity from liability on their several distinct contracts because of such violation of the Act regulating commerce.

The liability of the Storage Company to the receivers of the C. V. & C. Line is grounded on the obligation of that company to fully cover with insurance cotton deposited with it, and of the fire insurance companies, on policies of insurance which covered the peril of a fire while in the press and a right of action consequent upon a confederation between them and the Storage Company.

The obligation of the receivers was to keep the cottons delivered to them safely, and unless all the cottons which were entrusted to them be considered as forfeited, the principle applied by this court in the case of the Powhatan Steamboat Co. *v.* the Appomattox R. R., 24 How. 256, is decisive in their favor against the contention of the plaintiffs in error.

In the above case, goods entrusted to a warehouseman were lodged in its warehouse on Sunday contrary to a statute of Virginia. In

this case the contention is, that in some way and upon some occasion to be conjectured or inferred, Jones Bros. & Co. might have received an undue advantage in the shipment of one lot of cotton, and therefore every lot lodged in the press under the contract between the C. V. & C. Line and the Merchants' Cotton Press and Storage Company is forfeited, and the rights of action of the spinners, to whom Jones Bros. & Co. sold the cotton, by such forfeiture destroyed.

Mr. Justice Clifford, speaking for this court, said: —

"Unless the goods be considered as forfeited, or it be held that the property became vested in the defendants, it is difficult to see any reason why the plaintiffs ought not to recover in this suit, even admitting that the acts of landing and depositing the goods and the opening and closing of the warehouse are within the prohibitions of the statute."

The defence of the plaintiffs in error is not supported by any evidence whatever. Mr. Jones testifies to a further contract with Fellows as to rebates. But he is asked by Mr. Cummins, "Please state what rebates he paid you, or was to pay you?" And he responds, "Some of the bills of lading were issued at a less rate than the Boston rate of those dates. On others he paid me cash rebates."

Record, p. 214.

He is subsequently asked:

Q. 8. "What was the difference of the through rate from Memphis to Eastern mills or abroad, on all rail route and partially river via Cairo, and the balance rail to mills or seaboard?"

He answers: "It varies some; hence made a difference of two points or ten to twenty-five cents per bale. Some of the roads were cutting rates."

Record, pp. 214, 215.

In response to further questions, this witness says it was just as he had stated. Some roads might make ten cents a bale, others twenty-five cents, in some cases. It was owing to the size of the lot you wanted to ship, the number of bales.

The witness is then asked the following questions, to which he makes the responses hereafter set out : —

Q. "What difference did the same line make by all rail route and partially by river route to Cairo, and thence by rail?"

Ans. "If I understand, that is the question I have just answered in the one previous to this. I probably can explain it to you. The C. V. & C. Line and the Cincinnati Packet Company were both in the market for shipping over the two lines. Mr. Lightburn might come to me, and I give him a thousand bales, and give me twenty-five cents a bale rebate, and Mr. Fellows, of the C. V. & C. Line, might only want to give me ten cents. Of course I would accept the Lightburn rate, getting more money out of it."

Q. 11. "What I am inquiring about is this: What difference did the same line make in its all rail rate and its partially rail rate? For example, take the C. V. & C. Line; it might ship out of Memphis by railroad, or ship from Memphis to Cairo by water and then begin the rail transit. Now what difference did that company make by all rail transit and partially rail transit?"

Ans. "No difference, sir. They might put it in the bills of lading the same, but in some instances they paid, as I tell you, a rebate."

Q. 12. "What was about the difference in charge made by the same line, for instance, the C. V. & C. Line, where it bills cotton from Memphis to Eastern markets, all rail, and where it bills it partially by river and partially by rail?"

Ans. "I think they put it in their bills the same, but they generally paid a rebate on the river cotton."

Thus far the witness has not used one single expression tending to show that the C. V. & C. Line granted him any other or different rate than it granted to other shippers, for doing for him or them, a like and cotemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

The witness is farther interrogated as follows : —

Q. "In making your freight arrangements or engagements with the different carriers, what, if anything, was ever said between you and them about getting the best terms or the most favorable terms of shipment?"

He answers : "The only thing I remember of ever speaking about

was the quantity of cotton I would give them if they would give me a lower rate."

Q. "Then, if I understand you, the rate of freight as to Boston depends upon the amount of cotton you gave them?"

Ans. "Very much. Yes, sir."

Q. "They would charge you a less rate of freight for a large amount of cotton than for a small one?"

Ans. "Yes, sir. Sometimes make my entire commissions by engaging ten thousand bales at a time."

Q. "And they actually made those differences in rate depending upon the amount of cotton you shipped?"

Ans. "Yes, sir."

Q. "Did they not charge that regular rate of freight?"

Ans. "They might have charged them in the face of the bills, but they gave a rebate according to the quantity of cotton."

Q. "Was that the rule prior to the fire?"

Ans. "Yes, sir; I have had as high as a dollar a bale rebate."

Record, p. 216.

This testimony falls far short of inferentially tending to show that the C. V. & C. Line granted to Jones Bros. & Co., a different rate for the transportation of their cotton, and received from them a less compensation for the services to be rendered thereabouts, than from other shippers.

It is to be observed that the regular rate spoken of by the witness, Walter Jones, is a rate to Boston. The all rail rate to that point from Memphis is stated, upon some theory merely, to be 55½ cents under the tariff rate of freight. On two lots of cotton shipped from Memphis to Boston, the bill of lading rate of freight appears to be 53½ cents, both lots being shipped river and rail.

Taking the bill of lading rate of freight and the tariff rate of freight, as furnished by the witness Jones, upon the various lots of cotton shipped by that firm, and destroyed by fire in Press No. 4, we find that on the 21st of October a lot of one hundred bales marked "COMA" was shipped from Memphis to Northbridge, Mass., the contract rate of freight being 53 cents and the tariff rate 55½ cents. That on the same day a one hundred-bale lot marked "BUSY" was shipped from Memphis

to Woonsocket, R. I., the bill of lading rate being 52½ and the tariff rate 55½. On the 24th of October, twenty-five bales were shipped from Memphis to Boston marked "CUNI," bill of lading rate 52½ cents, tariff rate 55½ cents. That on the 7th of November, one hundred bales of cotton were shipped to Boston marked "DONN," bill of lading rate 52½ cents, tariff rate 55½ cents. And on the 27th of October fifty bales, marked "DOXO" were shipped to Fall River, Mass., with a bill of lading rate of freight of 52½ cents and tariff rate of 55½ cents.

It has been suggested that the fact that Jones' tariff rates of freight and bill of lading rates of freight, show discrepancies; the testimony of Fellows is overthrown, and the violation of the Interstate Commerce Law by the C. V. & C. Line established.

All the other bills of lading show just two cents difference between the bill of lading rate of freight and the tariff rate, as furnished by Jones, except the bill of lading for twenty-five bales of cotton marked "CIXI," which appears as having been shipped at all rail rate of freight, 55½ cents, on Jones' statement, but the bill of lading itself shows 53½ cents.

Five of the six above lots of cotton which show a difference greater than two cents the one hundred pounds between the tariff rate of freight furnished by Jones, and the bill of lading rate of freight, were shipped in October, and the sixth on the 7th of November.

The difference between the rate of freight to Boston and points of destination of above six lots does not appear on this record. The rate of freight fixed by the Central Traffic Association, on cotton shipments from Memphis, was to New York, with a differential rate to Eastern points to be fixed by the carriers themselves.

Record, pp. 207, 208.

All the shipments of cotton destroyed by the fire of the 17th of November, covered under the bills of lading of the C. V. & C. Line, were made by Jones Bros. & Co., except four lots, aggregating 500 bales, and respectively marked, "BAIL," 127 bales; "CODE," 123 bales; "PICA," 128 bales, and "SLOE," 122 bales. They were shipped in two lots of 250 bales each, by Ellerton L. Dorr & Co.,

on the 21st and 26th of October, 1887, from Memphis to Lewiston, Me. The rate of freight, as it appears by the bills of lading, was 52½ cents, so that if an argument can be predicated of comparative rates, it is manifest that Jones Bros. & Co. received no advantage over Ellerton L. Dorr & Co.

It was also argued, and may be again, that four shipments were all rail, and the two cents per one hundred pounds was deducted, and this violates the Act to Regulate Commerce.

The clients of writer are not the holders of the bill of lading of one hundred bales of cotton marked "ERNA," dated the 26th of October. The bill of lading for one hundred bales marked "DONN" is not an all rail bill of lading, but a river and rail bill of lading. The other two appear all rail on bills of lading.

Of these, one hundred bales marked "ETON" were shipped from Memphis to Chester, Pa., to E. H. Coates & Co., who recovered in the Supreme Court of Tennessee, from the Merchants' Cotton Press and Storage Company for breach of the contract to fully insure it and of the fire insurers of that company, the full value of the lot of cotton.

The bill of lading rate of freight on the one hundred bales marked "EMIN" appears to be 53½ cents per one hundred pounds; it appears that the bill of lading has the words "all rail," but the cotton was for shipment via the Anchor Line, and thus received into the press.

Record, pp. 208, 214.

There are no allegations in the pleadings challenging the validity of an all rail shipment.

It is next suggested that there were three shipments to the same point, river and rail; the first shipment being a differential rate of three cents and the other two of two cents each.

These are the first three lots set forth in the bill of complaint and were shipped from Memphis to Fall River. The bill of lading rate of freight for fifty bales marked "DOXO," is 52½ cents. For the two lots, one marked "MADE," and the other marked "HORN," the bill of lading rate is 53½ cents. This circumstance only tends to show that for the transportation of the fifty bales of cotton, one cent less per one hundred pounds was charged on the 27th of October than was charged for the transportation of the other two lots on the 9th

and 12th of November. There is no evidence tending to show that the service thereabouts was a like and cotemporaneous one, and under substantially similar circumstances and conditions. For aught that appears from this record the service in the transportation and delivery of the fifty bales of cotton was quite different from the service thereabouts of the one hundred and fifty and one hundred bale lots.

Again, there is not a scintilla of evidence tending to show that at the date of the granting of the bill of lading covering the fifty bales of cotton marked "DOXO," a shipper similarly circumstanced, and bringing a similar lot of cotton for shipment to the same point, would not have received precisely the same rate. Indeed, no shipper is shown to be in competition with Jones Bros. & Co., upon whom an undue disadvantage was imposed.

And again, there is not a scintilla of evidence tending to show that the C. V. & C. Line was not justified in carrying fifty bales of cotton from Memphis to Fall River on the 27th of October for Jones Bros. & Co. at a less rate than they would have carried them for another shipper. There are no circumstances set forth, either in the pleadings, or by witnesses, tending to show that the fifty bales of cotton to be transported for Jones Bros. & Co. could not have been so transported at a less cost to the C. V. & C. Line. The situation of the Union Manufacturing Company at Fall River might enable the delivery to be made to it where the cost of service to the railroad would more than make up the difference of five cents per bale, or $2.50 on the lot.

It is perfectly clear in the light of this record, that the C. V. & C. Line undertook faithfully to perform its obligations to the public, and to treat its shippers with strict impartiality. Upon a complaint being made that the N. N. & M. V. Co. had permitted into the press about one thousand bales of cotton, the Storage Company and that carrier claimed it was entitled to the transportation of it to Cairo. Fellows promptly changed the routing of the cotton, and when destroyed it was held for shipment by the C. O. & S. W. R. R., a constituent part of the N. N. & M. V. Co.'s system.

The testimony of the witness Jones is all the evidence adduced by the plaintiffs in error to sustain their defence that the transactions

between Jones Bros. & Co. and the agent of the C. V. & C. Line violated the Act to Regulate Commerce, and the Act amendatory thereof, and all the evidence to be found in the record.

Consequently, if their defence is aptly framed to, and did, raise a Federal question, the point raised being unsupported by any proof, this court is without jurisdiction to re-examine the judgment of the Supreme Court of the State of Tennessee.

N. O. *v.* N. O. Water Works Co., 142 U. S. 87.

A real, and not a fictitious Federal question is essential to the jurisdiction of this court over the judgment of State courts.

Hamblin *v.* Western Land Co., 147 U. S. 532.
Millingar *v.* Hartupee, 6 Wall. 258.

The defence set up is founded on the alleged existence of an established rate for the transportation of cotton from Memphis to the several points in the East, rail and river, to which the lots of cotton carried under the bills of lading of the C. V. & C. Line were to be transported, and its violations contrary to the law of the land.

Necessarily therefore, it must appear that there existed both an established rate and a statute in force to be violated, and that the carrier was within the statute, before a real Federal question is raised.

If the right claimed has no existence, it will hardly be insisted that this court can review the decision of the Supreme Court of the State of Tennessee.

Millingar *v.* Hartupee, *supra*.

Neither an established rate nor a statute which provided an established rate existed.

If the receivers of the C. V. & C. Line were subject to the Act to Regulate Commerce, that act did not establish a tariff, neither did it provide for the establishment of one that could not be lowered without notice or increased upon ten days' notice. Section 6 of Act to Regulate Commerce.

The tariff under which Fellows contracted was one formulated by a traffic association committee. It left him free to differentiate

when the shipments were to the New England points. Act to Regulate Commerce, Section 6.

The witness, Walter R. Jones, says a great deal about getting rebates, but when he is asked to look at his books "and file a statement of those rebates, the amount thereof, under your Fellows' contract," and he does so, he produces an itemized statement, showing each bill of lading, date, mark of the cotton, number of bales, weight, bill of lading rate of freight, tariff rate of freight, with a column for rebates, and in that column, opposite each lot of cotton, is the word "none."

Rec., p. 208.

On the same subject, Mr. Fellows says: —

"I never gave Jones Bros. & Co. any cut rate of freight from Memphis to points East. I never made any arrangements with the firm of Jones Bros. & Co., or with any other shippers at Memphis, in order to get their cotton for shipment to give them a cut rate of freight from Memphis to points East. . . . By the tariff agreed upon, two cents per one hundred pounds of the through tariff rate was allowed for the expense of insuring cotton while en route by boat from Memphis to Cairo. The agreed tariff for river and rail route, when the C. V. & C. Line covered the cotton by insurance to protect it while being transported from Memphis to Cairo, was exactly the same as the all rail route. When the owners and consignees of the cotton, through their agents or shippers, assumed the insurance risk from Memphis to Cairo, and relieved the C. V. & C. Line from the necessity of insuring the cotton while in transit from Memphis to Cairo, for its own protection, I issued bills of lading to such shippers at the net freight tariff rate, less two cents per one hundred pounds, allowed by the tariff for river insurance between Memphis and Cairo. This was no secret cut in rates, nor was it any cut in rates at all. By this arrangement the C. V. & C. Line simply permitted the shippers to insure their own cotton while in transit from Memphis to Cairo. Many of the shippers, particularly Jones Bros. & Co., knew that their principals (the owners and consignees of the cotton) insured the cotton from the time it was bought until delivered at the Eastern destination, in

policies in Eastern insurance companies. The shippers, knowing this fact, agreed with the C. V. & C. Line to assume the fire and marine risk from Memphis to Cairo, and got the advantage for their principals of the two cents allowed for such insurance by the tariff rate, rather than have the cotton doubly insured at the owners' expense while in transit from Memphis to Cairo. I had such an agreement with Jones Bros. & Co., and with other shippers. In all cases in which I had such an agreement for the shipper, owner, or consignee to assume the insurance risk from Memphis to Cairo, I inserted such a provision and stipulation in the bill of lading, and in consequence of such stipulation took off from the through freight rate the two cents per one hundred pounds allowed by the tariff for insurance between Memphis and Cairo. In some of the bills of lading this stipulation was in the words: 'usual danger by fire and navigation excepted,' or words to that effect, written in the face of the bill of lading. Later on in the season I procured a stencil plate containing the following stipulation: 'Via river to Cairo. Marine and fire risk expressly assumed by shipper, owner and consignee, from Memphis until landed at Cairo, Illinois,' and stamped that stipulation in the face of the bill of lading."

Rec., pp. 217, 218.

But however the question may be as to the liability of the receivers upon their several bills of lading, they had an insurable interest in the cotton deposited with them which they might cause to be specifically insured, or might at their option obtain insurance upon the entire interest therein, whether held by them or their bailees, and, *a fortiori*, they might make a contract with the Compress Company to insure the cotton, to take out insurance in good and solvent companies, so as to cover any loss of it, and particularly could they make such a contract with a Compress Company whose charter authorized it to make contracts of insurance, or to effect contracts to insure. Therefore, in case of loss, the receivers may recover the full amount of insurance due from the respective fire insurance companies, and any deficit as damages for breach of a contract on the part of the Storage Company, and it shall appear that the failure of the Merchants' Cotton Press and Storage Company to

take seasonable steps to collect the insurance effected by it, has caused loss, then to the extent thereof, recovery may be had. The proceeds arising from the several recoveries the receivers are entitled to apply: (1) to the satisfaction of their own claims; and (2nd) to pay over the residue to the owners, or the marine insurance companies, suing in right of owners.

Home Ins. Co. *v.* Baltimore Warehouse Co., 93 U. S. 527.
Deming *v.* Merchants' C. P. & S. Co., 6 Pickle (90 Tenn.), 306.
Phœnix Ins. Co. *v.* Erie Transportation Co., 117 U. S. 335.
Hutchinson on Carriers, Sect. 429.

The defendant fire insurance companies are called upon to perform their agreements, and pay the several amounts due upon their policies, because of the destruction of the cotton by fire, while contained in the premises of the Storage Company's Press No. 4. Their liability is not dependent upon the question whether the liability of the railroad company had been discharged or exists.

London & N. W. Ry. Co. *v.* Glyn, 1 Ell. & Ell. 652.

And so, too, with the Storage Company. Its obligation was to take out insurance so as to cover any loss of cotton entrusted to it for compression by the C. V. & C. Line, in good and solvent companies, so as to cover any loss which might arise from the destruction by fire on its premises. The liability of the insurance companies accrued upon the destruction of the cotton by fire, and there was a performance of the conditions precedent or a waiver of them on the part of the insurers, the liability of the Merchants' Cotton Press and Storage Company, when the cotton was destroyed and it was ascertained that company had not taken out, in good and solvent companies, insurance so as to cover any loss of it, and when it appeared that the company had neglected to collect the insurance actually taken out, but suffered the insurance policies to become worthless.

The rights of the defendants in error were not contingent upon the liability of the Railroad Company exclusively, for the policies of the Fire Insurance Companies covered every interest in the cotton,

and the contract with the Compress Company was to cover every interest in it. The incidental fact that there was other insurance is only to be considered in the application of the insurance.

Cal. Ins. Co. *v.* Union Compress Co., 133 U. S. 423.
Deming *v.* Merchants' C. P. & S. Co., *supra.*

The receivers could not, if they had been guilty of unjust discrimination in favor of Jones Bros. & Co., set up their wrong against the right of action arising upon their valid contracts of affreightment, as they could not, against their liability upon contracts collateral to the contracts of affreightment, and independent of them. The plaintiffs in error cannot set up the vice, if there is any, in the contracts of affreightment made by the receivers.

Ohio Life Ins. Co. *v.* Merchants' Ins. Co., 11 Humphrey, 1.
May on Insurance, Vol. 2, 3d Ed., Sect. 577.
Watertown *v.* Fire Ins. Co., 96 Penn. St., 37.

It appears from the opinion of the Supreme Court of Tennessee, that it formally passed upon two questions of a Federal nature. If, because alone of its doing so, this court has jurisdiction to re-examine the judgment of that court, the consequence is the motions to dismiss will be overruled. Yet, there being undoubted color for them, this court will inquire whether the questions on which jurisdiction depends are such as, in the language of Rule 6, not to need further argument, or it is manifest the writs of error were taken for delay only.

Upon an application of principles of the cases cited in the brief, the writs of error manifestly are sued out merely to delay the proceedings on the judgments recovered by the Supreme Court of Tennessee. And that against the Storage Company should be affirmed, with damages, with ten per cent in addition, to the interest awarded.

The writ of error sued out by the Storage Company to the decree rendered by the Supreme Court of Tennessee in favor of the receivers of the C. V. & C. Line against it and in affirmance of the decree of the Chancery Court of Shelby County, Tenn., was superseded and proceedings delayed. The Storage Company now assigns

errors to the decree, first, because the said Supreme Court "affirmed the decree of the Chancery Court of Shelby County, Tenn., wherein said last-mentioned court refused, upon the petition of this plaintiff in error and other petitioners, to remove the said cause to the Circuit Court of the United States for the Western District of Tennessee, at Memphis, Tenn.," and second, because it "found and held that the transactions mentioned in the record between Thomas and Tracy, receivers, did not amount to a violation of the Act of Congress, entitled an Act to Regulate Commerce, approved February 4, 1887, and the Acts amendatory thereof." This court in

Peyton *v.* Henneker, 132 U. S. Appendix;
Sire *v.* Ellithorpe Air Brake Co., 137 U. S. 579;
Gregory Mining Co. *v.* Starr, 141 U. S. 222,

after examining the grounds of error assigned, stated the rule by which it would, under Sections 2 and 3 of Rule 23, award ten per cent damages in addition to interest.

As to the Storage Company the writ of error in this case in manifestly without merit. It filed no petition for the removal of the controversy from the State into the Federal Court. Five of the other complainants in error did, and rested the right of removal on a controversy stated to be solely between the Storage Company and them, when "shortly after the fire, about $225,000.00 in value of the Fire Insurance Companies entered into an arrangement by which they are in effect bound by the results of the litigation against the Storage Co.,"

Record, pp. 94–96, 153,

and to which arrangement the five plaintiffs in error were parties.

The Storage Company and the other plaintiffs in error experimented in the State court and had decisions favorable and unfavorable, until finally their rights and liabilities were declared in the consolidated Compress Cases *supra*. And then five of them sought to have this suit transferred to the Federal Court. To sustain a removal would, in the language of this Court in Rosenthal *v.* Coates, 148 U. S. 147, violate the spirit of the Removal Acts. But the Storage Company did not even ask the right, notwithstanding it is here assigning

error on the ground the right was refused to it. It did, however, affirm the illegality of the contracts evidenced by the bills of lading on file. The decree against the Compress Company in favor of the receivers was upon a contract wholly distinct from the bills of lading of the C. V. & C. Line (one not vitiated by the violation of any obligation or duty by the receivers) and for breach of duty on the part of the Compress Company in the omission to collect choses in action provided under the said contract and for balance of a trust fund in the possession of the Storage Company as trustee. Proceedings to enforce this decree were stayed by this plaintiff in error without the semblance of a defence to the rights of action upon which the judgment of the Supreme Court of Tennessee was predicated.

JOHN M. BUTLER,
HOLMES CUMMINS,
WILLIAM H. CARROLL,

Attorneys for the defendants in error.

APPENDIX A.

Decrees were awarded against the plaintiffs in error, in favor of Anthony J. Thomas and Charles E. Tracy, receivers, as follows, the amount decreed bearing interest in each case: —

Merchants' Cotton Press and Storage Company	$4,394 12
" " "	35,509 09
" " "	52,315 10
National Insurance Company	3,403 08
The Fire Association	6,806 17
Continental Insurance Company	10,209 25
Liverpool, London and Globe Insurance Company	23,821 59
Phenix Insurance Company	23,821 59
Royal Insurance Company	23,821 59
Mutual Fire Insurance Company	34,030 84

APPENDIX B.

Provisions of Tennessee Code Relating to Practice of Courts of Chancery.

Section 5091. Original process may, by rule of Court, applicable to the Court where made, be returnable to the rule days, and all others, except final, may be so returnable.

Section 5092. The return days of all other process in the Chancery Court, such as subpœnas to answer supplemental and amended bills, and bills of revision, except final process, shall be the rule days of said Court.

Section 5093. Service of the original subpœna on the defendant, five days before the return day, shall bind him to appear within the first three days of the term, if the Court hold so long; otherwise on the first day of the term.

Note. — The amended bill of complaint and cross-bill of complaint was filed on the twenty-second day of September, 1891, and in that pleading, for the first time, was set forth the corporate domicils of the plaintiffs in error.